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In The

Supreme Court of the United States

October Term, 1997

STATE OF MINNESOTA, Minnesota Department of Natural Resources; RODNEY SANDO, Commissioner of Natural Resources; ARNE CARLSON, Governor of Minnesota; RAYMOND B. HITCHCOCK, Assistant Commissioner of Operations, Minnesota Department of Natural Resources,

Petitioners,

v.

MILLE LACS BAND OF CHIPPEWA INDIANS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX
VOLUME VII, Pages 1785 to 1963

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

REPORT

OF THE

COMMISSIONER OF INDIAN AFFAIRS.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
October 1, 1891.

SIR: I have the honor to submit the Sixtieth Annual Report of the Commissioner of Indian Affairs.

A SETTLED INDIAN POLICY

A variety of causes have of late conspired to stimulate public interest in the subject of Indian administration, and to provoke a very widespread discussion of the so-called Indian problem. As was to be expected, there has been a great diversity of views expressed, and many discordant theories advanced as to its proper solution. I think however, there is coming to be a very general consensus of opinion as to the essential elements that should enter into the settled policy of the Government in all its dealings with these people, and I venture to suggest the most important of them here with a view of furnishing a test of the present administration.

(1) Comprehensiveness. – It is important that any theory shall rest primarily upon a careful induction of all pertinent facts. No two reservations are exactly similar, and no two tribes present the same condition. The Indians, while alike as belonging to one common race and as sustaining to the United States Government the general relation of wards, differ among themselves very widely in language, manners, customs, religion, and environment. They represent a great number of distinct phases of human development.

Some are yet very degraded, living a mere animal life with few of the characteristics of humanity, while others have already become absorbed into our national life and are not distinguishable from their fellow citizens. Some still live by hunting and fishing; others, like the Nav-

* * *

REPORT OF THE SECRETARY OF THE INTERIOR.

In the case of Corfield v. Coryell (4 Washington's circuit court. 371), Mr. Justice Washington, in delivering the opinion of the United States circuit court for the district of Pennsylvania, discussed the privileges and immunities of citizens of the several States in the following language:

The inquiry is, What are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are *fundamental,* which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several

States which compose the Union from the time of their becoming free, independent, and sovereign. What these fundamental principles are it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: Protection by the Government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety subject, nevertheless, to such restraints as the Government may prescribe for the general good of the whole.

This definition of the privileges and immunities of citizens of the States has been adopted by the Supreme Court in the case of Ward *v.* Maryland (12 Wallace, 430), and again in the Slaughter House cases (16 Wallace, 76). Indians who become citizens of the United States have the right to claim and are entitled to receive from the government of the State in which they reside full protection in those fundamental privileges and immunities "which belong of right to the citizens of all free governments and which have at all times been enjoyed by citizens of the several States," as embraced in the general heads above quoted.

These fundamental privileges and immunities are civil in their character and may be further defined as those which are granted to man by his Creator and for the protection and restriction of which governments are designed and courts are established.

Besides these there are other privileges and immunities enjoyed by certain classes of the citizens of the several States which the Indians possessing the proper

qualifications will be entitled to claim and enjoy as citizens thereof. These are artificial, such as may be granted by the body politic and may be termed political liberties. They embrace the rights to participate in the government of the State, to vote, to hold office, and such other privileges and immunities of a like character as may be granted by the State to its citizens.

In compensation for his protection by the State in all these privileges and immunities, or such as he may be qualified to exercise, the Indian as a citizen will owe allegiance to the government of the State. Allegiance seems to be the term adopted to express in one word all the burdens and obligations of the citizens of a State or nation. Among these are those of obedience to the laws of the State, contributing, as by payment of taxes, to its support and bearing arms in its defense when called upon to do so.

* * *

March 11, 1905, Letter From The Commissioner Of Indian Affairs To Senator Knute Nelson

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

DEPARTMENT OF THE INTERIOR

OFFICE COMMISSIONER OF INDIAN AFFAIRS

WASHINGTON

March 11, 1905

Hon. Knute Nelson,
U.S. Senate,
Washington, D. C.

My dear Senator Nelson:

I have received your letter with the communication enclosed, but had already ordered one sent to Mr. Fullerton, who had addressed me separately on the subject, explaining to him that the delay in carrying ahead the correspondence was due to the accidental misdirection of one of the documents in the case, which arrived in the midst of a badly congested period. I am hoping to be able, with Mr. Fullerton's co-operation, to put the whole Indian game matter, as far as Minnesota is concerned, on a business-like footing. My desire is simply to do that which will keep the Indian within the law of the State without putting restrictions upon him which are not put upon white men under similar conditions.

Sincerely yours,

/s/ F.E. [Illegible]
Commissioner.

Portions Of 1913 Letter From The Commissioner Of Indian Affairs To James Goudy And Henry Sicade: Edward E. Hill, Compiler, *Guide To The Records In The National Archives Of The United States Relating To American Indians* (Washington: National Archives And Records Service, General Service Administration, 1981), Page 178.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

* * *

Territory, and (2) the right (is also secured) of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on *open and unclaimed lands.*

It appears that the Indians at no time had a greater right than the citizens of the Territory, for which reason they would not now have greater rights than the citizens of the State since it has been admitted to the Union. Therefore, whatsoever laws the State chooses to make for the Government of its citizens in respect to fishing, hunting, etc., will apply with like force to the Indians. If, however, the Indians are not by the treaty itself placed upon an equal footing with the whites, they would now be rendered so by reason of the fact that the act authorizing the admission of the State of Washington, dated February 22, 1889 (25 Stat. L., 676), made no exceptions in favor of Indians outside of the limits of their reservations; and the Supreme Court of the Untied States has held in a similar case (Ward v. Race Horse, 163 U. S., 504), in effect, that it would be incompatible with the admission of a State on an equal footing with the original States to imply

any such privilege not specifically granted by the citizens upon their admission to the Union.

Your friend,

XXX
Commissioner.

April 23, 1920, Letter From Commissioner Of Indian Affairs, Cato Sells, To John Grasshopper, Fond Du Lac Band, Document Nos: 39624 – 1920 – Fond Du Lac – 115, CCF 1907 – 1939, BIA, RG 75, NA.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

John Grasshopper,

Sawyer, Minnesota.

My Friend:

When you were in the Office not long ago, you asked about the right of the Indians to hunt and fish. In regard to your inquiry, your attention is invited to the very recent case of Kennedy v. Becker, 241 United States 556, involving a question similar to this. It was held in that case that tribal Indians are subject to the fish and game laws of the State of New York with respect to lands ceded by the tribe under the treaty of September 15, 1797, and which are not within the Seneca Indian Reservation, notwithstanding the reservation of hunting and fishing rights contained in the treaty. Following this decision, it is evident that the State of Minnesota can regulate hunting and fishing by the Indians on lands outside of their respective reservations. However, it will not be necessary for the Indians to take out state hunting and fishing licenses for their own reservations, but if the Indians wish to hunt and fish on lands under the jurisdiction of the state, it will be necessary for them to comply with the state laws regulating such matters.

I hope that the above will satisfactorily answer your question.

Your friend,

/s/ Cato Sells
CATO SELLS
Commissioner,

Assistant Commissioner Of Indian Affairs E.B. Meritt's Letter Of November 6, 1923, To James Bassett, 82333-1923-Consolidated Chippewa-115, CCF 1907-1939, BIA, RG 75, NA.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

NOV – 6 1923

Mr. James Bassett,

Onigum, Minnesota.

My dear Mr. Bassett:

Receipt is acknowledged of your letter of October 22, relative to taxation of Indian property and in regard to the right of Indians to hunt on the ceded part of the reservation.

In response there is enclosed herewith a copy of Indian Office Circular No. 1849 with reference to taxation of Indian property. If this does not give you the information desired, it is suggested that you write the Office a letter stating exactly the property to which you refer, how and from whom you received the property, whether you control same free from any supervision of the agent, etc., on receipt of which the matter will receive further consideration.

With reference to the right of Indians to hunt on ceded portions of the reservation, it has been held that while Indians may hunt or fish on unoccupied ceded lands it is necessary for them to comply with the state laws regulating the kind and quantity of game or fish to be taken, the protected seasons, etc. It is suggested that

you take this matter up with the local agent who will be able to advise you as to details.

Very truly yours,

/s/ E. B. Meritt
Assistant Commissioner.

copy to Consolidated Chippewa Agency.

1924 Circular Of The Office Of Indian Affairs' Counsel John R. T. Reeves, "Chippewa Indians Hunting And Fishing Rights", CA. 1924, 20940 – Great Lakes – 931, CCF 1907-1939, BIA, RG 75, A.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

CHIPPEWA INDIANS' HUNTING AND FISHING RIGHTS.

A large part of the domain now embraced in the States of Michigan, Wisconsin, and Minnesota, formerly claimed by the Chippewa Indians, was ceded to the United States by treaties with this tribe dated July 29, 1929 (7 Stat. 320); March 28, 1836 (7 Stat. 491); July 29, 1837 (7 Stat. 536), and October 4, 1842 (7 Stat. 591). As a part of the consideration for such cessions it was understood and agreed that reservations would be made for these Indians elsewhere, after the Indians had determined where they desired to be permanently located. In other words this was simply an effort on the part of the white man " to push the Indian farther west." For reasons not now entirely clear other possibly than a lack of desire on the part of the Indians to move, provision was not made for locating these Indians elsewhere and hence they were not required to move: See 151 U.S. 582; 201 U.S. 213 and 245 U.S. 437. Instead, by subsequent treaties, negotiations, ana acts of Congress, specific and greatly diminished reservations within the same domain previously referred to were set apart for various bands of the Chippewa Tribe, such as the L'Anse and Vieux de Sert in Michigan, the Leech Lake, Red Lake, White Earth, and

other bands in Minnesota, and the Lac Court Orielles, Lac du Flambeau, La Pointe and other bands in Wisconsin: See the treaties of September 30, 1854 (10 Stat. 1109), February 22, 1855 (10 Stat. 1165), October 2, 1863 (13 Stat. 667), March 19, 1867 (16 Stat. 719); act of January 14, 1889 (25 Stat. 642), and others.

In none of the treaties mentioned, including the act of January 14, 1889, commonly referred to as an agreement, were any fishing and hunting rights specifically reserved to these Indians except:

Treaty of 1829 (7 Stat. 322):

> "The right to hunt on the lands herein ceded, so long as the same shall remain the property of the United States, is hereby secured to the nations who are parties to this treaty."

Treaty of 1826 (7 Stat. 491):

> "The Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement."

Treaty of 1837 (7 Stat. 537):

> "The privilege of hunting, fishing and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed to the Indians, during the pleasure of the President of the United States."

Treaty of October 4, 1842 (7 Stat. 592):

> "The Indians stipulate for the right of hunting on the ceded territory, with the other usual

> privileges of occupancy, until required to remove by the President of the United States, and that the laws of the United States shall be continued in force, in respect to their trade and intercourse with the whites, until otherwise ordered by Congress."

At best, under the foregoing, it would seem that the Indians can now claim only a right to hunt and fish within the areas so ceded in common with the other citizens of the States or Territories; i.e. in accordance with the laws of the State governing such matters. In other words, as to the ceded areas, the Indians now have no right to hunt and fish therein in derogation of the laws of the State: *Ward v. Race Horse* (163 U.S. 504-507) and *Kennedy v. Becker* (241 U.S. 556).

Admittedly, of course, the Indians have a right to hunt and fish in such ceded areas in common with the other citizens of the State, no more nor no less, and of such right they can not well be denied. *United States v. Winans* (198 U.S. 371-381). This is a long way, however, from saying or contending that the Indians have a right to hunt and fish in such ceded territory, at will regardless of the statutes of the State with reference to seasons, bag limits, licenses, etc. etc.

As I see the situation, therefore, the Chippewa Indians have a right to hunt and fish within their existing reservations without complying with the laws of the State (in re Blackbird 109 Fed. 139), but outside of those reservations they must comply with the State game laws: *Ward v. Race Horse* and *Kennedy v. Becker, supra.*

Reeves (Sgd)
Attorney.

Assistant Commissioner Of Indian Affairs E.B. Meritt's May 22, 1924, Letter To J.A. Wakonabo, 3589-1924-Consolidated Chippewa-115, CCF 1907-1939, BIA, RG 75, NA.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Mr. J. A. Wakonabo,

Ball Club, Minnesota.

Dear Sir:

In reference to your letter of May 5th relating to hunting and fishing privileges of Chippewa Indians of Minnesota, it may be said that as a rule Indians have a right to hunt and fish on their reservation and also on lands allotted them so long as the allotments have not passed into private ownership, notwithstanding that a particular reservation has been opened to settlement and there are no longer any recognized reservation boundary lines for the reason that the title to the lands involved is still in the government.

It has been held, however, by the Solicitor of this Department that the State of Minnesota has the right to regulate hunting and fishing by Indians as well as others within the ceded portions of the reservation and that such right extends to individual allotments of land within such ceded portions of the reservation.

Therefore Indians in Minnesota when hunting and fishing on ceded lands which have passed to the jurisdiction of the state are required to comply with the state game and fish laws.

It should be remembered, however, that inasmuch as the preservation of game and fish is for the benefit of the Indians as well as the whites, Indians should comply with the state game and fish laws as far as practicable while hunting and fishing within present reservations and should not take game or fish unless necessary for their maintenance and subsistence.

The federal migratory bird law applies alike to Indians and whites on the reservation as well as on State lands and should be strictly observed by the Indians.

Very truly yours,

/s/ E.B. Meritt
Assistant Commissioner,

Copy to Consolidated Ute
[Illegible]

May 5, 1926, Letter From Commissioner Of Indian Affairs, Charles H. Burke, To Louis Aynemahsung, Frank Barney, Mike Houle, 21115-1926-Consolidated Chippewa-115, CCF 1907-1939, BIA, RG 75, NA.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Messrs. Louis Aynemahsung,
Frank Barney,
Mike Houle,
Sawyer, Minnesota.

MAY -5 1926

Gentlemen:

The receipt is acknowledged of your letter of April 25, relative to the hunting and fishing rights of the Chippewa Indians under Article V of the Treaty of September 29, 1837 (7 Stat. L., 493).

As the legal description of the particular tract of land where you were hunting is not known, the Office is unable to state whether or not you were within your rights. However, your attention is invited to the fact that the treaty of September 29, 1837 was modified by the Chippewa Treaty of February 22, 1855 (10 Stat. L., 1165), Article I of which provides for the cession of certain lands, and contains the following cession: "And the said Indians do further fully and entirely relinquish and convey to the United States any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere". Provision was made in said treaty for payment to the various bands of the Chippewa Indians for the cessions made by them.

Therefore if the land where you were hunting is within any of the land ceded by said Indians, it would be necessary for you to comply with the state law in view of the modified provisions of the treaty.

Sincerely yours,

(*Signed*) *Chas. H. Burke*
Commissioner.

5 TO 1

Copy to Consolidated Chippewa.

Assistant Commissioner Of Indian Affairs, E.B. Meritt's October 15, 1926, Letter To J.A. Wakonabo, 43033-1926-Consolidated Chippewa-115, CCF 1907-1939, BIA, RG 75, NA.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

OCT. 15, 1926

Mr. J. A. Wakanabo,
Inger, Minnesota.

Dear Sir:

Answering further your letter of September 29, 1926, relative to the hunting and fishing rights of Indians on ceded land in Minnesota, in view of the existing decisions of the courts of some of the other states on the same subject, it is not believed that the Chippewa Indians of Minnesota would have a right to take game and fish on ceded lands which are now in the hands of private owners and under the jurisdiction of the state without complying with the State game laws.

Very truly yours,

(Signed) E. B. Meritt

Assistant Commissioner.

10-ACC-7-1

Carbon to Consolidated Chippaway Agency.

Superintendent To Commissioner
(December 14, 1928)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

UNITED STATES

DEPARTMENT OF THE INTERIOR

INDIAN FIELD SERVICE

Cass Lake, Minn., Dec. 14, 1928.

The Honorable
Commissioner Indian Affairs,
Washington, D.C.

Sir:

I have the honor to acknowledge receipt of a carbon copy of your communication to Congressman Harold Knutson, reference above, written under date, Dec. 19.

Notwithstanding repeated advice to the contrary issued by your Office to the Chippewas, as well as the broadcasting of such advice by this office, the Chippewas insist that that the treaties of 1837, 1842 and 1855 permit the Indians to hunt, fish and trap on the ceded lands regardless of Minnesota laws and regulations. The communication to Congressman Knotson, while ostensibly a query, is, in reality, a reassertion of such right, with a suggestion of confirmation by him.

The only recommendation I can make is that the Indians who are parties to the communication be told again that they are amenable to the game laws of the

State. I hope that some day a test case will go to final adjudication, authoritively settling the matter.

Very Respectfully,

/s/ E.A. Allen
Superintendent.

September 13, 1929, Letter From Assistant Commissioner Of Indian Affairs, J. Henry Scattergood, To Senator Henrik Shipstead

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

SEP 13, 1929

My dear Senator:

Referring to your letter of August 15 and accompanying papers relative to Indians fishing on the Leech Lake Reservation, according to information received from the field, many of the Indians in the vicinity of Leech Lake have been fishing with nets for white fish and other varieties on state territory in violation of the state game laws.

The Superintendent of the Consolidated Chippewa Agency has on several occasions asked the State Game Commissioner and various game wardens to be as lenient as possible with the Indians when fishing for their own use. This has been done in a general way, but it is very doubtful that anything can be done to prevent the state game authorities from confiscating nets when used for commercial fishing in violation of the state game laws, on territory under state jurisdiction.

We know of no treaty stipulations under the terms whereof the Chippewa Indians of Minnesota have the right to hunt or fish on land ceded to the United States and sold or otherwise disposed of under the general land laws, without observing the state game laws.

State game regulations do not, however, apply to reservation Indians, though citizens, when taking game

or fishing on tribal Indian land or on trust or restricted Indian allotments.

Sincerely yours,

(Signed) J. Henry Scattergood
Assistant Commissioner.

Hon. Henrik Shipstead,

United States Senate.

Copy to Consolidated Chippewa

February 3, 1932, Department Of The Interior Circular Authored By Commissioner Of Indian Affairs John Collier, Entitled "Hunting And Fishing By Indians, And By Other On Indian Reservations", Box 62, Decimal Correspondence File 105-124, Consolidated Chippewa, BIA, RG 75, NA-CPR

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Miscellaneous.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of Indian Affairs
Washington

February 3, 1932.

HUNTING AND FISHING

By Indians, and by others on Indian Reservations.

Inquiries are so frequently received regarding hunting and fishing by Indians, and by others on Indian reservations, that a brief statement of a few fundamental principles will prove helpful.

By Indians.

1. In the absence of legislation by Congress to the contrary, which, generally speaking, has not been had, State statutes relating to hunting, or fishing – commonly referred to as State game laws – do not apply to the Indians while hunting or fishing on their own restricted

allotments or on unallotted tribal lands within Indians reservations.* As such State statutes, however, are designed to conserve and protect fish and game from unnecessary destruction, we endeavor to encourage the Indians wherever practicable to familiarize themselves with such statutes and to follow them as a good measure for the protection of their own best interests.

* This does not apply to public domain allotments.

2. Aside from the foregoing, our superintendents and other officers in charge of Indian reservations make no attempt to control or regulate hunting or fishing by Indians on their own reservation or on their own trust or restricted allotments.

3. Indians have no right, of course, to hunt or fish on the lands allotted to or owned by another Indian without the consent of the latter. To do so would constitute trespass and on complaint of the owner the superintendent should use his best efforts to prevent it.

4. While hunting or fishing outside of the reservation or on allotted lands no longer held in trust or restricted, Indians, as with other citizens of the State, are subject to the State game laws and to the jurisdiction of the courts of the State for violation of those laws, to the same extent as any other citizen of the State.

5. Treaties with certain tribes sometimes carry express retention not only of an exclusive right to hunt and fish within their reservation, but also a right to hunt and fish on ceded lands outside the diminished reservation, particularly "at their usual and accustomed places" or "in common with the other citizens of the State". This

simply means that a State, by legislation or otherwise, can not deny to the Indians a continued right to enjoy, in common with the other citizens of the State, fishing and hunting privileges in accordance with the laws of the State, but such treaty provisions do not give to the Indians a right to hunt outside their reservation in derogation of the game laws of the State; i.e., out of season, etc. Interested parties, Indian or others, should consult with the superintendent or other officer in charge of the particular reservation in which they may desire information as to any particular treaty provisions that may be applicable to such reservation.

By persons other than Indians.

See Sec. 216, Title 25 U.S. Code

6. Persons other than Indians have no right to hunt, fish, or trap on an Indian reservation without permission of the superintendent in charge of the reservation. The practice in the matter of granting such permits is not uniform as it depends on local conditions. On some reservations those privileges are entirely prohibited to outsiders, or may be entirely prohibited in certain districts or at certain seasons. For some reservations, written regulations on the subject have been formulated and approved by the Indian Office to govern such privileges on the particular reservation involved. On others, where no particular problems are involved, the matter is left almost entirely to the discretion of the reservation superintendent. In cases where permits are issued, a fee is usually charged for such reservation permit.

7. Any outsider interested in obtaining permission to hunt, fish, or camp on an Indian reservation should communicate directly with the superintendent in charge of the reservation for particulars.

8. Persons other than Indians must not only comply with such special rules and regulations as may be in force on the particular reservation, but they must also *comply* with the *State* laws and regulations governing hunting, fishing, and trapping, and the Federal Migratory Bird Law and Regulations. Where State or county hunting, fishing, or trapping licenses are required by State laws, permittees must provide themselves with such licenses.

9. Possession of a State or county hunting, fishing, or trapping license does not of itself confer the right to hunt, fish, or trap on an Indian reservation. Permission from the superintendent or other officer in charge must also be obtained.

10. Possession of a reservation permit does not give persons other than Indians the right to hunt, fish, or trap, on an Indian reservation without complying with the State laws, including the obtaining of the necessary State and county licenses.

11. All persons (other than Indians) on Indian reservations, including lessees, traders, employees, and others, are expected to comply with the State laws as well as local reservation regulations.

12. The State laws apply on Indian reservations and the State courts have jurisdiction, as to any actions by whites, or other non-Indian persons, which do not involve Indians, Indian trust property, or the operations

of the Federal Government. While superintendents and other officers in charge of reservations, are not responsible for enforcement of the State laws, they may take action whenever necessary or advisable to require compliance by outsiders or non-Indians with the State laws or for prosecutions in the State courts under said laws; superintendents and the State authorities are expected to cooperate in the enforcement of State and Federal laws according to the circumstances of the cases which may arise.

/s/ John Collier
Commissioner.

April 5, 1934, Opinion Of United States' Solicitor Margold, *As Cited In* The March 2, 1942, Reply Brief Of The Appellee In *Tulee v. Washington*, 315 U.S. 681 (1942)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

* * *

ARGUMENT IN REPLY.

The principal arguments advanced by appellant in this case, in the court below and on this appeal, have been vigorously urged upon this court and rejected by it in the leading cases upon which the appellee State of Washington relies, namely, *Ward v. Race House* [sic], 163 U. S. 504, *Illegible v. Smith*, 221 U.S. 559, *U. S. v. Winans*, 198 U. S. 371, and *State ex rel. Kennedy v. Becker*, 241 U. S. 566.

That the holdings in these landmark cases have been recognized and accepted by the appellant government up until the time of this appeal is evidenced by the opinion of the Solicitor for the Department of Interior, dated April 5, 1934, (Vol 54, Decisions of the Department of Interior, p. 418) whose conclusions at that time were identical with the position of the appellee State of Washington in this case, and in full consonance with the effect given these cases by the highest courts of Washington,[4] Michigan,[5]

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[4] *U. S. v. Taylor*, 3 Wash Terr 88, *State of Washington v. Towessnute*, 89 Wash 478; *State of Washington v. Alesas*, 89 Wash. 492, *State of Washington v. George Memnock*. 115 Wash 528; *State of Washington v. Jim Wallahee*, 143 Wash. 117, *State of Washington v. Tulee*, 107 Wash 2d 16

[5] *People v. Chosa*, 252 Mich. 154.

Wisconsin,[6] New York.[7] In fact, appellee's position could not be more succinctly stated than by employing the language of the Solicitor's opinion, which we herewith set forth:

"MARGOLD Solicitor:

Near Celilo Falls, on the Oregon shore of the Columbia River, is a small Yakima village called Celilo. For many generations the Columbia River at this point has been a usual and accustomed fishing place of the few Indians who have made their homes at Celilo and of other members of the tribe. Celilo is not within the Yakima Reservation but is upon a seven-acre tract owned by the United States. In 1929, Congress placed this tract under the control of the Secretary of Interior "for the use and benefit of certain Indians now using and occupying the land as a fishing camp site." (45 Stat. 1158)

The Treaty between the United States and the Yakama (usually designated Yakima) Nation of Indians was concluded June 9, 1855. (12 Stat. 951) Article 3 of that treaty provides that "the exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." The nature of the fishing privilege thus reserved at usual and accustomed places outside the

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[6] *State v. Morrin*, 136 Wis 552, (1908), *State v. La Barge*, 234 Wis. 449 (1940).

[7] *State ex rel. Kennedy v. Becker*, 215 N. Y. 42.

Yakima Reservation has been adjudicated by the Supreme Court of the United States.

> "It is not to be doubted that the power to preserve fish and game within its borders is inherent in the sovereignty of the State (Greer v. Connecticut, 161 U. S. 519; Ward v. Racehorse, 163 U. S. 504, 507), subject of course to any valid exercise of authority under the provisions of the Federal Constitution. It is not denied – save as to the members of this tribe – that this inherent power extended over the *locus in quo* and to all persons attempting there to hunt or fish, whether they are owners of the lands or others. The contention for the plaintiffs in error must, and does, go to the extent of insisting that the effect of the reservation was to maintain in the tribe sovereignty *quoad hoc*. As the plaintiffs in error put it: 'The land itself became thereby subject to a joint property ownership and the dual sovereignty of the two peoples, white and red, to fit the case intended, however infrequent such situation was to be.' We are unable to take this view. It is said that the State would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the locus in quo, either would be free to destroy the subject of the power. Such a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both.
>
> * * * We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative or so to divide the inherent power of preservation as to make its competent

exercise impossible. Rather we are of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the State over the lands where the privilege was exercised. This was clearly recognized in United States v. Winans, 198 U. S. 371, 384, where the court in sustaining the fishing rights of the Indians on the Columbia River, under the provisions of the treaty between the United States and the Yakima Indians, ratified in 1859, said (referring to the authority of the State of Washington): "Nor does it" (that is, the right of 'taking fish at all usual and accustomed places') "restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised." Kennedy v. Becker, 241 U. S. 556, 562, 562-564 (1916).

In accord are the cases of *United States v. Winans*, 198 U. S. 317 (1905); *People v. Chosa*, 252 Mich. 154, 233 N. W. 205 (1931). It follows that a regulation of fishing imposed by a State, operative on all persons alike, reasonably adapted to the preservation of wild life in the waters of the State for the common benefit, and not in its intendment or operation a denial to the privileged Indian community of its right to fish, is lawful, and not a treaty violation. This principle permits a State to restrict the devices and types of tackle which fishermen generally, including the privileged Indian community, may employ in the waters within its jurisdiction. *Kennedy v. Becker,*

supra; State v. Towessnute, 89 Wash. 478, 154 Pac. 805 (1916); *State v. Morrin*, 136 Wis. 552, 117 N. W. 1006 (1908).

The Columbia River is under the concurrent jurisdiction of the States of Oregon and Washington (10 Stat. 90; 11 Stat. 383) and the power of each State to regulate fishing in the river is established. *McGowan v. Columbia Packers' Association*, 245 U. S. 352 (1917); *Nielson v. Oregon*, 212 U. S. 315 (1908).

The first question propounded by the Commissioner of Indian Affairs concerns the use of a "willow weir," a device long employed by the Indians to obstruct a stream in such wise that the salmon run is directed through a particular channel. The Commercial Fisheries Code of Oregon makes it "unlawful for any person or persons to operate or maintain * * * any fish traps, weir * * * or any device * * * used in catching salmon * * * without first having obtained * * * a license therefor." Oregon Code Ann. (1930) Sec. 40-503. See also Secs. 40-309 ff. All funds derived from license fees are employed under the direction of the State Fish Commission in the preservation, propagation and protection of fish, the maintenance of hatcheries and related enterprises. Sec. 40-105. The classification of fishing devices is entrusted to the State Fish Commission Sec. 40-115. It does not appear that any regulation promulgated by the State Fish Commission discriminates against Indian fishermen. Nor it is claimed that license to employ any device has been refused to Indian fisherman arbitrarily.

Therefore, answering question 1, it is my opinion that the Treaty of 1855 does not reserve to the Yakima Indians

the privilege of constructing a "willow weir" in the channel of the Columbia River at Celilo Falls in disregard of the State laws and regulations above mentioned.

The second question concerns the right of the State to require the Indians to secure a license for the selling of fish and to require that they pay poundage tax upon such sales. Such requirements are imposed by the Commercial Fisheries Code and operate equally upon all persons. Secs. 40-501, 40-515. The privilege reserved in the Treaty of 1855 is expressly defined as a "right of taking fish." It cannot be construed as an exemption from the general laws of the State taxing and regulating the sale of fish. It does not appear that a license has been required for or a tax imposed upon the sale of fish by the Indians upon their reservation or at any other place under the jurisdiction of the United States. Answering question 2, it is my opinion that no Indian may lawfully sell fish at any place within the jurisdiction of the State of Oregon unless he shall have obtained a license for that purpose and shall pay such tax as the State may impose upon vendors. Of course, any discriminatory treatment Indians vendors in the administration of these regulations would be unlawful."

Furthermore, the unreported opinion of Acting Solicitor Kirgis of the Department of the Interior, dated June 15, 1937 (referred to on Page 40, Appellant's Brief) does not overrule the previous opinion of April 5, 1934, cited above. In the latter opinion, the Acting Solicitor concludes that the Indians may have a possible claim against the government for the destruction of their fishing places

on the Columbia River occasioned by construction of the Bonneville Dam by the United States.

The policy which the government may adopt towards its Indian wards has nothing whatsoever to do with the issue involved herein. The fact that the government, as stated in the opinion, may feel morally or legally obligated to provide monetary reimbursement to the Indians for the extinguishment of fishing sites through its hydroelectric developments does not alter the effect of the decisions of this court on the question of the state's power to reasonably regulate the fishing operations of all those entitled to enjoy the privilege in waters within its jurisdiction. Indeed, appellant has nowhere asserted that the United States has any authority whatsoever to make provision for the protection of fish in the waters of the State of Washington. No such authority has been ceded to the Federal Government. The state's fisheries are local in nature, and particularly the salmon fisheries in the Columbia River, since the salmon themselves spawn in the tributaries and headwaters found within the state. A conservation law, operative upon the people of the state, but not operative upon the Indians when within the state but off their reservations who are privileged to enjoy fishing in common with all citizens, would not subserve the interests of either the Indian citizen or the white citizen. The state, through its fish and game laws, is exercising an inherent obligation of sovereignty when it conserves and perpetuates a valuable food supply in which all the people of the state have a common concern.

The ever growing magnitude of the state's conservation problems on the Columbia River alone is recognized in the opinion *sub silentia* in the admitted destruction of

fishing sites by the United States government and the concomitant diminution of the supply in accommodating the fish runs to new and unnatural conditions.

Appellee does not differ, but on the other hand, agrees with the Acting Solicitor in his opinion cited above that the cases of *United States v. Winans* and *Kennedy v. Becker* stand for the proposition that the treaties perpetually guaranteed the Indians against any discrimination toward them in their fishing activities "at usual and accustomed places in common with the citizens of the Territory." THE CASES, HOWEVER, HOLD THAT THE INDIANS AND ALL OTHERS WHO PARTICIPATE IN THE TAKING OF FISH FROM THE WATERS WITHIN THE JURISDICTION OF THE STATE ARE SUBJECT TO ANY REASONABLE AND APPROPRIATE REGULATION INHERENT IN THE SOVEREIGNTY OF THE STATE WHICH MAY BE NECESSARY FOR THE PRESERVATION OF WILD LIFE.

TREATY WAS NOT AN ATTEMPT BY THE UNITED STATES TO ABRIDGE THE STATE'S POLICE POWERS. IT WAS INTENDED TO SECURE THE TRIBE FROM ANY DISCRIMINATION AS TO FISHING PRIVILEGES "AT THEIR USUAL AND ACCUSTOMED FISHING PLACES" OFF THE RESERVATION AGAINST THE TRIBAL MEMBERS IN FAVOR OF THE CITIZENS OF THE UNITED STATES.

Appellant in this court, and in the court below, relies principally on the case of *United States v. Winans, supra,* and attempts to distinguish *Ward v. Race Horse, supra, Coyle v. Smith, supra,* and *Kennedy v. Becker, supra,* which

cases appellee submits are controlling. We shall, therefore, discuss each case in its chronological order:

(1) *Ward v. Race Horse* was decided by this court in 1896. Race Horse, a Bannock Indian who retained his tribal relation and resided on a reservation, was convicted of violation of game laws of Wyoming on unoccupied public lands of the United States not within a reservation. The Treaty (15 Stat. 673) made when Wyoming was a territory, provided that the Indians

> "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the border of the hunting districts."

The Circuit Court held that the Act of Congress admitting Wyoming into the Union did not by necessary implication repeal or abrogate the treaty and that the treaty provision remained in force. The decree was reversed on appeal to this court.

Appellant herein attempts to distinguish the case at bar on the ground that the hunting rights reserved in the *Race Horse* case were of an ephemeral nature, as distinguished from a continuous or perpetual right. This was the exact view entertained by the Circuit Court, which had held the right was a continuing one and survived Wyoming's full fruition of statehood.

The *Race Horse* decision, in substance, holds that Congress has the power by subsequent statue to abrogate the provisions of an Indian Treaty and that when an act of Congress admits a state into the Union, and declares without reservation that such state shall have all the

powers of the other states of the Union, this constitutes an abrogation of any previous treaty stipulation with the Indians within the territory of such state respecting their right to take fish and game; that to exempt Indians from state laws regulating fishing and hunting within the border of a state after its admission into the Union would deprive the state of its sovereign power to regulate the rights of hunting and fishing, and would deny to such state admission into the Union on an equal footing with the original states, on the ground that a treaty with the national government giving the right to hunt and fish within a territory which subsequently is embraced within the limits of a state is a privilege in conflict with the act of admitting the state into the Union on an equality with the other states and is repealed thereby. We quote from page 514 of the opinion:

> "Determining, by the light of these principles, the question whether the provision of the treaty giving the right to hunt on unoccupied lands of the United States
>
> * * *

The Assistant Secretary Of Interior's Letter Of January 26, 1938, To The Attorney General Of The United States, 20940-Great Lakes-931, CCF 1907-1939, BIA, RG 75, NA.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Forestry & Grazing
1273-38

JAN 26, 1938

The Honorable

The Attorney General.

My dear Mr. Attorney General:

Receipt is acknowledged of your letter of January 5 (CEC-KHC 90-2-0-161), regarding the case of State of Michigan v. George Cardinal, an Indian of the L'Anse Reservation, Michigan, involving the right of the Indians of that reservation to fish in derogation of the State game laws.

On receipt of your letter of September 16, 1937, the Superintendent in charge of the Great Lakes Indian Agency was requested to submit a report as to the facts in the matter, particularly the status of the Indian involved and the place where the alleged violation was committed. Copies, in duplicate, of the superintendent's report dated November 23, 1937, are enclosed, together with copies of decisions by the courts of the State, unreported as far as we have been able to discover, in the cases of State v. James Forcia, and State v. James J. Chosa and Basil Attikons, both of these cases also dealing with the hunting and fishing rights of the Indians of the L'Anse Reservation.

From the Superintendent's report it will be seen that in the case at hand, George Cardinal is an Indian of the Chippewa Tribe, of one-half or more Indian blood, a resident of the reservation, that he has not received an allotment of land in severalty, and that the offense complained of was committed in the waters of Keweenaw Bay, an arm of Lake Superior.

Whether the waters of this bay, or the lands underlying them, do or do not comprise part of this Indian reservation is a matter regarding which the local United States Attorney and the Superintendent of the Great Lakes Indian Agency are not in accord. In his letter to you of September 27, 1937, the United States Attorney advises that the alleged violation occurred in "territory ceded to the United States but not within the boundaries of a reservation." On the other hand, the Superintendent of the Great Lakes Agency contends that the lands underlying the waters of this bay, or the greater part of them at least, are a part of and hence "within" the reservation, and further, that even if not within the reservation, the Indians still have a right to fish therein, regardless of the laws of the State, because of provisions found in earlier treaties with the Chippewa Tribe.

Undoubtedly, if the area in question is a part of the existing Indian reservation then the Indians have a continued right to fish therein, in derogation of the State game laws and without interference by State officers: In re Blackbird (109 Fed. 139); United States v. Hamilton (233 Fed. 685); and State v. Johnson (249 N.W. 285). As to whether this bay is a part of the Indian reservation it may be pointed out that by the treaty of October 4, 1842 (7 Stat. 591), the Chippewa Indians ceded to the United

States "all of the country within" certain boundaries set up in Article 1 of that treaty, including the area here in question, one of the clauses of that description being "thence northwardly across said lake (Superior) to *intersect the boundary line between the United States and the Province of Canada.*" By Article 11 of that treaty:

> The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States, and that the laws of the United States shall be continued in force, in respect to their trade and intercourse with the whites, until otherwise ordered by Congress.

A substantially similar provision will be found in Article 5 of an earlier Treaty with the Chippewa Tribe, dated July 29, 1837 (7 Stat. 536), by which treaty these Indians ceded an extensive area claimed by them in the present states of Michigan, Wisconsin and Minnesota. By a later treaty, however, with the same tribe, dated September 30, 1854 (10 Stat. 1109), it was provided, in part:

> Article 2. The United States agrees to set apart and withhold from sale, for the use of the Chippewas of Lake Superior, the following described tracts of land, vis:
>
> 1st. For the L'Anse and Vieux De Sert bands, all the *unsold* lands in the following townships in the State of Michigan: Township fifty-one north range thirty-three west; township fifty-one north range thirty-two west; the east half of township fifty north range thirty-three west; the west half of township fifty north range thirty-two west, and all of township fifty-one north

range thirty-one west, lying west of Huron Bay. (Emphasis supplied.)

* * *

Article 11. * * * And such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President.

From the enclosed map of the L'Anse Indian Reservation it will be seen that Keweenaw Bay, or the greater part of it at least, falls within township 51 north, range 32 west and township 51 north range 33 west, which townships, it will be observed, are among those set up in Article 2 of the treaty of September 30, 1854, supra, as a reservation for the L'Anse and Vieux De Sert Band of Chippewa Indians, embracing all of the *unsold* lands therein. While not definitely shown by the record now here, Keweenaw Bay, "being an arm of Lake Superior," evidently is to be regarded as "navigable".

As to the locus of the title to the lands underlying this bay, it may be pointed out that Michigan was admitted into the Union as a State on January 26, 1837, by act of Congress of that date (5 Stat. 144), pursuant to earlier legislation found in the acts of June 15 and June 23, 1836 (5 Stat. 49 and 59). Under the doctrine extensively propounded by the Supreme Court in the case of Shively v. Bolby (152 U. S. 1), and related cases, all lands underlying navigable bodies of water, not otherwise specifically disposed of by the United States, passed to the new State on the date of its admission into the Union, subject to the continued right of Congress to regulate interstate and foreign commerce thereover, under Sec. 3, Article 1, of our Constitution. While on that date – January 26, 1837 –

the area here in question comprised part of the domain claimed by the Chippewa Tribe, which they did not formally cede until October 4, 1842 – some seven years after admission of the new State into the Union – yet under the holding of the Supreme Court in United States v. Holt State Bank (270 U.S.49) it must be conceded that title to the lands underlying Keweenaw Bay, if navigable, has passed to the State of Michigan. The reservation subsequently set apart for the L'Anse and Vieux De Sert Bands of Chippewa Indians by the treaty of September 30, 1854, supra, of the *unsold* lands in specified townships and ranges therein described would not, as we view it, under the court decisions hereinabove referred to, include any lands underlying navigable bodies of water therein.

The continued right of the Indians to hunt and fish in the areas ceded by them in derogation of the State game laws, remains to be considered. That right was expressly retained by them in the three treaties referred to "until otherwise ordered by the President". We do not find any such order ever having been issued by the President pursuant to Article 11 of the Treaty of September 30, 1854, supra, but we do find such an order with reference to the Treaties of 1837 and 1842, supra, issued under date of February 6, 1850, by President Taylor, which order reads:

> The privileges granted temporarily to the Chippewa Indians of the Mississippi by the fifth article of the Treaty made with them on the 29th of July 1837, "of hunting, fishing and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded" by that Treaty to the United States; and the right granted to the Chippewa Indians of the Mississippi and Lake Superior, by the Second Article

> of the treaty with them of October 4th, 1842, of hunting on the territory which they ceded by that treaty, "with the other usual privileges of occupancy until required to remove by the President of the United States", are hereby revoked; and all of the said Indians remaining on the lands ceded as aforesaid, are required to remove to their unceded lands.

It follows, therefore, that as to the areas ceded by the treaties of July 29, 1837 and October 4, 1842, the Indians have no greater right to hunt or fish therein than do the other citizens of the state; that is, the Indians are amenable to the game laws of the state while hunting or fishing within the areas ceded by those treaties. The area here in question, having been ceded by the treaty of October 4, 1842, it is not seen how we can now successfully contend that the Indians have a right to hunt or fish therein, in derogation of the state game laws.

As to the area ceded by the Treaty of September 10, 1854, supra, no such order ever having been issued by the President, a considerable question remains as to the continued right of the Indians to hunt and fish in the area ceded by that treaty, in derogation of the state game laws.

It has been contended, with which contention the Supreme Court of the State in the Chosa-Attikson case appears to agree, that even though no formal order by the President curtailing or revoking the hunting and fishing rights retained by the Chippewa Indians in the areas ceded by them has ever been issued yet, necessarily, such rights have become curtailed by implication or otherwise, because of changed conditions and circumstances as we find them today, compared with those existing in 1842,

1854, or thereabouts, when these treaties were negotiated. Cited in support of this latter contention is the case of Kennedy v. Becker (241 U. S. 556). That case dealt with a treaty or "contract entered into, under the sanction of the United States," between Robert Morris and the Seneca Nation of Indians, dated September 15, 1797 (7 Stat. 601), wherein those Indians sold to Robert Morris all their right, title, and interest in and to the considerable area of land therein described, lying in the western part of the State of New York, and in which agreement the Indians reserved to themselves and their heirs "the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed." In dealing with that situation the Supreme Court of the United States held, in effect, that the right so reserved to the Seneca Indians was simply one in common with the other citizens of the State and hence that the Indians were amenable to the State conservation laws when fishing outside of their diminished reservations to the same extent as other citizens of the State.

In the absence of an appropriate order by the President, we are not prepared to concede, that the rights of the Chippewa Indians to hunt and fish on the areas ceded by the treaty of September 30, 1854, supra, are controlled, or are to be determined by the decision of the Supreme Court in the Kennedy v. Becker case, supra, but rather that a more liberal view, in favor of the Indians may and should be asserted, in harmony with the holding by the Supreme Court in the Winan's case (198 U. S. 371).

The Indians are ever zealous in insisting on their continued right to hunt and fish within these ceded areas, without interference by officers of the State, under the

provisions of the treaties referred to, and the question is one that has proven troublesome, administratively, for many years, usually resulting in disagreement between the State and Federal officers as to the real rights of the Indians in the premises, a question which as far as the Indians are concerned doubtless will not satisfactorily be put at rest until it has been determined by the court of last resort.

If the area involved in the case at hand, – State v. George Cardinal, – had been ceded by the Treaty of September 30, 1854, with the Chippewa Indians, rather than by the Treaty of October 4, 1842, I would be moved to suggest that an appeal be taken in this case, but in view of the President's order of February 6, 1850, affecting the area here in question, I am constrained to advise that on the facts at hand it appears that an appeal would be useless, or futile, other than to satisfy the Indians whose rights are involved as to the merits of the controversy.

Much of the confusion regarding situations of this character seems to have arisen from the fact that apparently the President's order of February 6, 1850 was overlooked, or was not brought to the attention of the courts, as to which see the cases of United States v. Thomas (151 U. S. 577; particularly pages 582-583), and Lemieux v. Agate Land Company, (217 N. W. 454; particularly pages 458 and 459).

Sincerely yours,
[Illegible]
Assistant Secretary,

Enclosure 852535
1-ma-15

July 29, 1938, Letter From F.H. Daiker, Assistant To The Commissioner Of Indian Affairs, To J.C. Cavill, Superintendent, Great Lakes Agency, 43931-1938-Great Lakes-931, CCF 1907-1939, BIA, RG 75, NA.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

JUL 29 1938

AIRMAIL

Mr. J. C. Cavill,

Supt., Great Lakes Agency.

Dear Mr. Cavill:

This will refer to your letter of July 12 relative to the arrest of John Noveaux, Sr., an allotted member of the Bad River Band of Chippewa Indians, for fishing with nets in Lake Superior without a State license. It is noted that you say that Mr. Noveaux was fishing in Lake Superior from restricted Indian land; that the nets were tied to the shore on one end and extended out from shore into Lake Superior.

The general area which includes the Bad River Indian Reservation was ceded to the United States by the Chippewa Indians of the Mississippi and Lake Superior in the Treaty of October 4, 1842 (7 Stats., 591). That cession included the lands comprising the present reservation. The territory described in said cession extended out in Lake Superior at one point at least to the boundary line between the United States and Canada. Article II of said Treaty provided as follows:

> "The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States, and that the laws of the United States shall be continued in force, in respect to their trade and intercourse with the whites, until otherwise ordered by Congress."

While fishing is not specifically mentioned in said Article II, it would undoubtedly be included in the language "with the other usual privileges of occupancy".

However, such special privileges reserved by Article II of said Treaty were revoked by Presidential Order of February 6, 1850. Therefore, the Chippewa Indians can not use that article of said Treaty to support a claim of a right to fish or hunt in that area without complying with the State laws. The LaPointe or Bad River Indian Reservation was created by the Treaty of September 30, 1854 (10 Stats., 1109), between the United States and the Chippewa Indians of Lake Superior. The description of the reservation (Article 2 of said treaty) is as follows:

> "2d. For the LaPointe band, and such other Indians as may see fit to settle with them, a tract of land bounded as follows: Beginning on the south shore of Lake Superior, a few miles west of Montreal River, at the mouth of a creek called by the Indians Ke-che-se-be-we-she, running thence south to a line drawn east and west through the centre of township forty-seven north, thence west to the west line of said township, thence south to the southeast corner of township forty-six north, range thirty-two west, thence west the width of two townships, thence north the width of two townships, thence west

> one mile, thence north to the lake shore, and thence along the lake shore, crossing Shag-waw-ne-quon Point, to the place of beginning. Also two hundred acres on the northern extremity of Madeline Island, for a fishing ground."

It will be observed that the main body of the reservation runs only to the shore line. Therefore, that reservation does not include the submerged land under the lake or any part thereof. Lake Superior is a navigable body of water and the part thereof adjoining the State of Wisconsin is under the jurisdiction of the laws and courts of that State, except that it is subject to any laws of Congress governing trade and commerce.

Therefore, the Indians can not claim exemption from the State fish and game laws on any assumption that the reservation included a part of the lake.

It might be pointed out that said Article 2 also sets aside 200 acres on the northern extremity of Madeline Island for a fishing ground. It is not believed, however, that we could successfully assert that such reservation would have the effect of a perpetual authorization for the Chippewa Indians to fish in Lake Superior, at the point involved in this case at least, without complying with the laws of the State.

Article 11 of the said Treaty of 1854 provides that such of the said Chippewa Indians of Lake Superior "as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President".

However, that provision refers only to lands ceded by that Treaty and does not renew or recreate any rights

they might have had prior to their cession in the above-mentioned Treaty of 1842.

In view of the foregoing, the Office has not found any basis upon which to request the Department of Justice to take steps to defend the above-mentioned Indian on the theory that he was within his treaty rights.

Sincerely yours,

(Signed) F. H. DAIKER
Assistant to the Commissioner.

CC – Great Lakes Agency.

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Approved: [Illegible]

Assistant Secretary.

July 8, 1939, Letter Of Assistant Commissioner Of Indian Affairs, William Zimmerman Jr., To Representative Harold Knutson, 41544-1939-Consolidated Chippewa-931, CCF 1907-1939, BIA, RG 75, NA.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Hon. Harold Knutson,

House of Representatives.

My dear Mr. Knutson:

This will acknowledge your letter of June 24 with reference to the right of Indians to hunt and fish. Particular mention is made of a band of Indians at Vineland, Minnesota, on an old reservation in that locality.

The general area which includes Vineland was ceded to the United States by the Chippewa Nation by the Treaty of July 29, 1837 (7 Stat. 536). Article 5 of said Treaty provides as follows:

> "The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [sic] to the Indians, during the pleasure of the President of the United States."

The privileges granted by said Article were specifically revoked by Executive Order of February 6, 1850.

A small reservation at Mille Lac was established under the provisions of Article 2 of the Treaty of February 22, 1855 (10 Stat. 1165), and a part of this was ceded by

the Treaty of May 7, 1864 (13 Stat. 693). No special hunting privileges on ceded lands were reserved by either of these two treaties.

On their own reservations Indians who have not received patents in fee simple for their allotments are not subject to the State Game and Fish Laws. Outside their reservations, however, they are subject to the State Laws.

There is enclosed herewith for your information a copy of an Indian Office bulletin on the subject of hunting and fishing. We do not have copies of the treaties available to send out, but they may be found in law libraries containing the United States Statutes. In addition to the United States Statutes mentioned above the Indian treaties may be found in Volume 3 of Kappler's Indian Laws and Treaties.

Sincerely yours,

/s/ William Zimmerman, Jr.
ASSISTANT Commissioner

Enclosure 2005932.

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Portions Of February 13, 1942, Brief For Appellant Filed With The United States Supreme Court In *Tulee v. Washington*, 315 U.S. 681 (1942).

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In The Supreme Court of the United States

OCTOBER TERM, 1941

No. 318

SAMPSON TULEE, APPELLANT

v.

STATE OF WASHINGTON, APPELLEE

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR APPELLANT

OPINIONS BELOW

The majority and minority opinions of the Supreme Court of the State of Washington are reported in 7 Wn. (2d) and appear in the record of pages 16-34.

JURISDICTION

The judgment of the Supreme Court of Washington was entered April 2, 1941 (R. 38). The petition for appeal

was filed (R. 43) and allowed (R. 47) on June 30, 1941. Jurisdiction to entertain this appeal is based on Section 237(a) of the Judicial Code, as amended by the Act of the Yakima tribe, is not entitled to exercise the rights which, under the treaty, the Yakima Nation has reserved and the United States has pledged its faith "to secure" to the Yakima Indians. To the extent that the other elements essential to appellant's affirmative case have not been conceded by the state and recognized by the state Supreme Court, they are established by the decision of the Court in *United States v. Winans*, 198 U. S. 371. Accord: *Seufert Bros. Co. v. United States*, 249 U.S. 194. The *Winans* case holds that the fishing provision was appropriately incorporated into the treaty with the Yakimas and that the rights reserved under it, outside as well as inside the reservation, constitute not mere privileges or licenses to be enjoyed at the sufferance of the United States, of the state or of the owner of the property on which the "usual and accustomed" fishing places are situated, but perpetual rights *which are entitled to protection under the treaty against impairment by the State of Washington* and its grantees as well as against the United States and its grantees. The case related to an ancient Yakima fishing place not far from Spear-fish and which, like the one at bar, was neither inside nor on the borders of the Yakima Reservation. The lands under and around the fishery had passed into private ownership. Title to the land between high and low water marks, on which the fishing place itself was located, deraigned from a grant by the State of Washington which had acquired these shorelands by operation of law on its admission into the Union "on an

equal footing with the original States."* Title to the abutting lands had been acquired under patents from the United States. Neither the state grant nor the federal patents referred to the Yakima treaty; nor did they make the conveyances subject to any Indian rights. Winans, the private owner, sought, by fencing his lands, to prevent the Indians from using his property as a means of approach to the fishing place. In addition, he erected a fishing wheel at the fishery itself, acting in this respect pursuant to a license granted him by the State of Washington, and thereby made it impossible for the Indians to catch any fish there even if they could have succeeded in obtaining access thereto.

The United States, as guardian of the Yakima Indians, sued in the United States Circuit Court for the District of Washington to enjoin Winans from maintaining the fence or the wheel and from interfering in any way with the fullest exercise by the Indians of their rights under the Yakima treaty. This Court, reversing the Circuit Court

* * *

> rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though

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*Act of February 22, 1889, sec. 8 (25 Stat. 676, 679). If the fishing rights provision had been omitted from the Yakima treaty, "the full proprietary right" in these lands would have passed to the state simultaneously upon its admission into the Union. *Pollard v. Hapan*, 3 How. 212 (44 U. S.); *Weber v. Harbor Commissioners*, 18 Wall. 37 (85 U. S.); *Manchester v. Massachusetts*, 139 U. S. 240; *Hardin v. Jordan*, 140 U. S. 371, 381; *Shively v. Bowlby*, 152 U. S. 1; *Mann v. Tacoma*, 153 U. S. 273; *Port of Seattle v. Oregon & W.R.R.*, 255 U. S. 56, 63; *Borax, Ltd. v. Los Angeles*, 296 U. S. 10, 15-17.

described therein. * * * They were given "the right of taking fish at all usual and accustomed places," and the right "of erecting temporary buildings for curing them." The contingency of the future ownership of the lands, therefore, was foreseen and provided for – in other words, the Indians were given a right in the land – the right of crossing it to the river – the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. *And the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees.* [Italics ours.]

* * *

It is further contended that the rights conferred upon the Indians are subordinate to the powers acquired by the State upon its admission into the Union. In other words, it is contended that the State acquired, by its admission into the Union "upon an equal footing with the original States," the power to grant rights in or to dispose of the shore lands upon navigable streams, and such power is subject only to the paramount authority of Congress with regard to public navigation and commerce. The United States, therefore, it is contended, could neither grant nor retain rights in the shore or to the lands under water.

The elements of this contention and the answer to it are expressed in *Shively v. Bowlby*, 152 U. S. 1. It is unnecessary, and it would be difficult, to add anything to the reasoning of that case. The power and rights of the States in and over shore lands were carefully defined, but the power of the United States, while it held the

country as a Territory, to create rights which would be binding on the States was also announced, opposing the dicta scattered through the cases, which seemed to assert a contrary view. * * *

* * *

The extinguishment of the Indian title, opening the land for settlement and preparing the way for future States, were appropriate to the objects for which the United States held the Territory. And surely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed as "taking fish at all usual and accustomed places." Nor does it restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised.

Since the case involved no attempt by the state to regulate the exercise by Yakima Indians of their property rights under the treaty, no question as to the interpretation of Article VI,

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supra), and (3) the power to regulate commerce with the Indians.* To be relevant in the case at bar, the state's

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*The federal power over commerce with the Indian tribes is broader than over other commerce. 1 Op. Atty. Gen. 645; Prentice and Egan, *The Commerce Clause of the Federal Constitution*, p. 342. In *United States v. Forty Three Gallons of Whiskey*, 93 U. S. 188, 194, the power over commerce with the Indian tribes has been declared to be "as broad and as free from restrictions as that to regulate commerce with foreign nations,"

contentions in point I must be taken as suggesting that the state police power or an exercise of it must prevail over an exercise of federal power, to the extent that there is a conflict between them. Such a suggestion is clearly untenable. This Court has repeatedly held that under Article VI, clause 2, it is the exercise of federal power that must prevail and the state police power which must yield when and to the extent that the two come in conflict.*

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which, in *Bowman v. Railroad Co.*, 125 U. S. 465, was said to be absolute and exclusive. The fact that commerce with Indians may be wholly intrastate does not diminish the federal power over it. *United States v. Holliday*, 3 Wall. 407; *United States v. Forty Three Gallons of Whiskey, supra.* The constitutional power over commerce with the Indian tribes, as contemporaneously construed by Congress in the Indian trade and intercourse acts dating from 1789, includes the control of hunting, trapping, trespass and various other subjects not necessarily related to transportation, buying or selling. See Cohen, *Handbook of Federal Indian Law* (1941), 69, 91-93, 306-307. But even if the conception of commerce be given its more ordinary significance the state in this case has been at the same pains to show that appellant *was* engaged in commercial fishing.

There is nothing in *Geer v. Connecticut*, 161 U. S. 519, which detracts in any way from the foregoing observations. In that case it was held that a state could prohibit the exportation of game despite the inhibitions of the commerce clause because the ownership of the state in game was said to be absolute. The state can assert no such absolute ownership here, since under the *Winans* decision, its property rights must be considered as having been subject to the profit *á prendre* reserved for the Indians under the Yakima treaty.

**Henderson, etc. v. Mayor of New York*, 92 U. S. 259, 271; *Railroad Co. v. Husen*, 95 U. S. 465, 471; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 661; *Walling v. Michigan*, 116 U. S. 446, 460; *Lisy v. Hardin*, 135 U. S. 100, 108; *McCoy v. United States*, 195 U. S. 27, 60; *Jacobson v. Massachusetts*, 197 U. S. 11, 25; *Adams*

Moreover, it is now definitely settled that the same principle applies where an exercise of the federal treaty power conflicts with and therefore curtails the state police power (see note 6, p. 18, *supra*. Indeed, the case of *Prigg v. Pennsylvania*, 16 Pet. 539, cited by the state, is one of the classic decisions which first enunciated the doctrines of incidental federal powers and of the supremacy of their exercise over the state police power. In that case, this Court actually held a Pennsylvania statute punishing the kidnapping in the state of escaped slaves to be unconstitutional and void because it conflicted with a federal law enacted by Congress pursuant to Article IV, section 2, of the Constitution.

The contention in point II of the state's brief similarly are valid only to the extent that they are immaterial to the issues in this case, and invalid to

* * *

assumption. The protection of the treaty right against impairment by reason of any state law is provided for in Article VI, clause 2, of the Constitution and need not be reinforced in every instance by an affirmative provision against state regulation in the federal treaty or law covering the right.* This does not mean, of course, that a

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Express Co. v. New York, 232 U. S. 11, 31; *Charlston & Western Carolina Ry. Co. v. Varnville Furniture Co.*, 237 U. S. 597; *Adams v. Tanner*, 211 U. S. 550, 591-595; *Buchanan v. Warley*, 245 U. S. 60, 71; *Looney v. Cram*, 245 U. S. 178, 187; *Panhandle Co. v. Highway Commission*, 294 U. S. 613, 619.

*In *Winters v. United States*, 207 U. S. 564, 577, this Court said:

" * * * On account of their relations to the Government, it cannot be supposed that the Indians were alert to exclude by

conflict necessarily occurs in every case where a state regulation is applied to a treaty right, for it sometimes may be proper to interpret the treaty as conferring a right or privilege which was intended to be subject to state regulation.

Thus, if the United States entered into a treaty with the Dominion of Canada in which Canadians were granted the right to fish in the part of the Columbia River where it flows through the State of Washington "in common with" the citizens of that state, and the citizens of Washington were granted the right to fish in the Columbia River where it flows through Canada "in common with" citizens of the Dominion, it might be proper to hold that the fishing rights granted to the Canadians were intended to be exercised subject to such regulations in the interests of conservation as are generally applicable under the Washington laws. While the United States would have had power to preclude the applicability of the state laws, it would be reasonable, in the absence of a specific provision, to hold that the treaty was not intended to do so. Several circumstances would combine to support such an interpretation. The situation prior to the treaty was one where citizens of Canada either had no right at all or certainly no right that was free from state regulation. The state was in existence, and its power and functions and authority well known. It, therefore, would

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formal words every inference which might militate against or defeat the declared purpose of themselves and the Government, even if it could be supposed that they had the intelligence to foresee the 'double sense' which might some time be urged against them."

be reasonable to assume, in the absence of a specific provision precluding state regulation, that it was not intended to grant a right free from regulation where none had been enjoyed before.

A very different situations existed, however, in the case at bar. As this Court pointed out in the *Winans* case, the Indians prior to the treaty possessed full rights of occupancy "upon the exercise of which there was not a shadow of impediment." Had the state been in existence, these rights admittedly would not have been subject to state regulation. Thus the treaty is relied on, not by the Indians as the source of their rights, but by the state as the basis for its regulatory power; and the treaty provisions must be looked at to see how far they affirmatively curtailed the Indian rights rather than how far they

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Portions Of A December 28, 1984, Brief For The Respondent, Klamath Tribe, Filed With The United States Supreme Court In *Oregon Fish & Wildlife Department v. Klamath Tribe*, 473 U.S. 753 (1985).

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

* * *

The legislative history and surrounding circumstances of the cession agreement show plainly that Congress' sole purpose was to benefit the Tribe by honoring the United States' treaty obligations. The 1906 Senate Committee Report quotes a federal court opinion ruling that the government's power under the 1864 Treaty to dispose of Klamath Treaty Reservation lands arises from the trust relationship and not the United States' sovereign power of eminent domain.

Under these circumstances, it is certain that Congress intended only to limit the Tribe's rights to hunt and fish to the degree necessary to accommodate the changed circumstances brought about by placement of the lands into national forests. A total taking away was not necessary nor was it intended. This rationale lies at the heart of this Court's ruling in *United States v. Winans*, 198 U.S. 371 (1905), a leading case also upholding off reservation fishing rights, and is fully applicable here. Article IV of the cession agreement, preserving consistent treaty rights, confirms this congressional purpose. Thus, while the cession necessarily resulted in the loss of exclusive tribal rights to hunt and fish within the ceded area, it did not result in the loss of the compensable right to hunt and fish free of state regulation. Tribal rights have further

been accommodated to the changed circumstances by the fact that the Tribe claims no rights appurtenant to the land itself, *i.e.*, the Tribe does not assert the right to enter on private lands over the objection of the landowner.

The cession was not effectuated for the purpose of opening lands to settlement by non-Indians. Rather, the exercise of the rights at issue is compatible with the status of the land. Cases relied on by the State, holding that tribal rights to hunt and fish are automatically abrogated in areas of diminished reservations that were ceded for the purpose of opening the reservations for non Indian settlement, are distinguishable based on both the purpose of the cession and the nature of the right asserted.

This Court has held that statutes purportedly affecting hunting and fishing rights should be construed in light of their overall purpose. Here, as in *Menominee Tribe v. United States*, 391 U.S. 404 (1968). Congress' over all purpose was to settle finally an obligation to the Tribe, not to give rise to additional claims for the taking of compensable treaty property rights. A construction of the Land Act resulting in a loss of the rights would conflict with Congress' clear purpose of benefiting the Tribe and honoring Treaty obligations. Moreover, because Congress was unquestionably acting in its role as trustee for the Tribe, the confiscatory results urged by the State are precluded. *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980) (Congress may either act as a trustee for the Tribe's benefit or it may act as a sovereign and take tribal property, but it may not act in both capacities simultaneously). And, because Congress is the trustee of tribal

property, this Court has held that congressional expressions of intent to abrogate treaty hunting and fishing rights must be clear and unambiguous: "backhanded" or inherent abrogations are not favored. *Menominee Tribe v. United States*, 391 U.S. 404, 412 (1968).

The canons of construction consistently applied by this Court to statutes ratifying agreements with Indians require that they not be construed to the Indians' prejudice. Rather, they are to be interpreted liberally in the Indians' favor as the Indians would have understood in light of the surrounding circumstances. *Antoine v. Washington*, 420 U.S. 194 (1975). Here, the Tribe knew that the boundary commission and the inspectors who negotiated the agreement were aware of, and had relied on, the importance of the ceded areas to the Tribe for hunting and fishing.

The Tribe also knew that the appraisal of the land's value was detailed and did not include hunting and fishing rights. Moreover, the value had never been the subject of negotiation with the United States. Inspector McLaughlin simply informed the Tribe that he had accepted the Boundary Commission's value and that their negotiations were limited to the issue of how the Tribe would utilize the proceeds. Finally, they were aware that the agreement contained a provision preserving consistent treaty rights and that virtually all of the land to be ceded was unentered, unenclosed forest that was useful almost exclusively for hunting, fishing and gathering (other than speculative timber production). Under these circumstances, the Klamaths would not have understood the agreement to extinguish their hunting and fishing rights in these important tribal areas.

Congress has been consistently solicitous of the Klamaths' hunting and fishing rights. The 1864 Treaty specifically preserves the rights as does the 1954 Klamath Termination Act. The vast majority of the 1864 Treaty Reservation, both those lands ceded in 1906 and those sold pursuant to the 1954 Termination Act, are now in national forests. Most of the remainder is private commercial forest land on which hunting and fishing is permitted. It would be anomalous to permit the Klamaths to hunt and fish on that portion of their Treaty Reservation sold at termination but to deny them that right on the smaller ceded portion of the same Treaty Reservation, consisting of similar forest lands, on the strength of an agreement that does not even mention hunting and fishing rights.

ARGUMENT

A. In Ratifying The 1901 Cession Agreement, Congress Intended To Limit Klamath Indian Treaty Rights Only To The Extent Necessary To Accommodate The Changed Circumstances Brought About By Placement Of The Ceded Lands In National Forests.

The analytical framework for this case was set forth by the Court in *United States v. Winans*, 198 U.S. 371 (1905), which involved tribal hunting and fishing rights on ceded lands. In holding that Yakima Indian treaty right to hunt and fish survived private acquisition in fee patent of the Indians' usual and accustomed fishing places, this Court stated:

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them – a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose.

198 U.S. at 381.

Before the Treaty of 1864, the Klamath Indians possessed the unquestioned right to hunt and fish over 22 million acres of territory. Following the Treaty, the purpose of which was to provide a home for the Tribe large enough to permit them to be self-sufficient primarily through hunting, fishing and gathering.[4] The Tribe possessed the *exclusive* right to hunt and fish within the Reservation. The right to hunt and fish free of state

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[4] In United States v. Adair, 478 F. Supp. 336, 345 (D. Or 1979), *mod.* 723 F.2d 1394 (9th Cir. 1984), *cert. denied*, ___ U.S. ___ (1984), the district court held that "the principal purpose of the [1864 Klamath] Treaty was to provide an area so they could continue to be self-sufficient." The district court further found that the Treaty's primary means of promoting tribal self-sufficiency was through protection of tribal hunting, fishing, trapping and gathering rights. Agriculture was found to be a secondary means. The Ninth Circuit concurred, 723 F.2d at 1409-10, see discussion *infra* at 39.

regulation was only part of the exclusive rights held by the Tribe before the cession. Like the Yakima Indians in *Winans*, the rights asserted here were part of larger rights "which were not much less necessary to the existence of the Indians than the atmosphere they breathed." 198 U.S. at 381. Indeed, the areas at issue here were initially included within the Reservation's boundaries at the Indians' insistence because of their tremendous importance to the Tribe for hunting and fishing.

Congress was thoroughly apprised of these circumstances in 1906 through the reports of the Klamath Boundary Commission, the inspector who negotiated the agreement and the reports of the Department of the Interior. In the years between the 1901 Agreement and the 1906 Act ratifying it, Congress had closed virtually all of the ceded lands to entry and placed them within national forests in anticipation of ratification of the cession agreement. Moreover, Congress' primary purpose was to benefit the Tribe by honoring a treaty obligation to rectify a survey error.

Thus, while the Indians' treaty rights had to be accommodated to the changed status of the ceded lands, no "taking away" was necessary nor was it intended. This congressional scheme is confirmed by the provisions of Article IV of the cession agreement providing for the preservation of consistent treaty rights.

1. Article IV Of The Cession Agreement Reflects Congressional Intent To Preserve Compatible Treaty Rights

Article IV of the 1901 Agreement provides:

> It is understood that nothing in this agreement shall be construed to deprive the said Klamath and other Indians of the Klamath Agency of any benefits to which they are entitled under existing treaties, not inconsistent with the provisions of this agreement.

The right asserted by the Tribe here is not inconsistent with the property interest conveyed by the Tribe nor is it incompatible with the purposes of the cession.

a. A Right To Hunt And Fish Free Of State Regulation May Exist Apart From An Ownership Or Possessory Interest In The Land.

The Tribe asserts no continuing proprietary interest in the lands within the ceded area, *i.e.*, a right that is appurtenant to the land itself. The Tribe asserts no right within the ceded area to hunt and fish on private lands over the landowner's objection. Thus, because the right is not a servitude on the land, it is consistent with the Tribe's cession of full right, title and interest in the land itself.[5] Congress has specifically determined that rights of

[5] The common law has long recognized the right to take wild animals and fish on land owned by another, since such creatures were the property of no one. Early lawmakers in this country eschewed the notion that individual landowners hold

possession and occupancy are not prerequisite to the continued existence of Klamath treaty rights to hunt, fish, gather and trap. In the Klamath Termination Act, Act of August 13, 1954, 68 Stat. 718, 25 U.S.C. § 564. Congress terminated the remaining portion of the Tribe's post cession Reservation. However, 14(b) of the Act 25 U.S.C

absolute ownership of fish and game located on their property in favor of the view expressed in Blackstone's *Commentaries* that "by the law of nature every man, from the prince to the peasant, has an equal right of pursuing, and taking to his own use, all such creatures as are *ferae naturae*, and therefore the property of nobody . . . " 2 W. Blackstone, *Commentaries on the laws of England*, at 411 (1st ed. 1766) (footnote omitted). In Lund, Early American Wildlife Law, 51 N.Y.U.L. Rev. 703 (1976), the author notes that "[i]n America, the winner of the debate was Blackstone. The American belief in common rights to wildlife was manifested in doctrines that rejected landowner claims of special privilege and allowed free taking even on private lands." Id. at 712. In the constitutions of Pennsylvania and Vermont, the hunters' right to enter all unenclosed private land was recognized. Pa. Const. § 43 (1776); Vt. Const. § 39 (1777). Id. at 713 n.77. This general understanding was explained by Justice Holmes in McKee v. Gratz, 260 U.S. 127, 136 (1922).

> The strict rule of the English common law as to entry upon a close must be taken to be mitigated by common understanding with regard to the large expanses of unenclosed and uncultivated land in many parts, at least, of this country. Over these it is customary to wander, shoot, and fish at will until the owner sees fit to prohibit it. A license may be implied from the habits of the country . . .

This right to hunt on private land is to be distinguished from a *profit a prendre* which is an enforceable right to hunt or fish on the land and would be an interest in land in the common law. Minnesota Valley Gun Club v. Northline Corp., 290 N.W. 222 (Minn. 1940).

§ 564m(b), provided that notwithstanding termination of the Reservation's status as a federal Indian Reservation and sale of a portion of its lands, "[n]othing in [this Act] shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoined under federal treaty." *See Kimball v. Callahan*, 493 F.2d 564 (9th Cir.), *cert. denied*, 119 U.S. 1019 (1974) (Kimball I); *Kimball v. Callahan*, 590 F.2d 768, 772 (9th Cir.), cert. denied, 444 U.S. 826 (1979) (*Kimball II*). "The Court in *Kimball I* did not base its decision that withdrawn tribal members retained their treaty rights to hunt and fish upon any rights to tribal property. On the contrary, the court expressly recognized that withdrawn members relinquished all interests in tribal property."[6]

This Court has also recognized that treaty rights to hunt and fish may exist apart from an interest in the land itself. In *Antoine v. Washington*, 420 U.S. 194 (1975), the Court upheld Indian rights to hunt and fish free of state regulation on land to which the Tribe had ceded all right, title and interest and which was thereafter opened to settlement by non-Indians. In *Antoine* two Indians were convicted in state court of the offenses of hunting and possession of deer during closed season in violation of state law. The "crimes" occurred on unallotted non-Indian land which had been within the boundaries of the

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[6] With respect to the Klamath Reservation lands sold pursuant to the 1954 Termination Act (the lands of issue in *Kimball I* the United States Court of Claims had previously found that "[t]he Government took full title, without restriction, and will pay full fair market value as of the taking . . ." Klamath and Amodoc Tribes v. United States, 193 Ct. Cl. 670, 690, 436 F.2d 1008, 1018 (Ct. Cl. 1971).

Colville Indian Reservation prior to diminishment. The cession agreement between the United States and the Tribe provided that "the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in any wise abridged." 420 U.S. at 196 (footnote omitted). Noting that there was no issue of any *right* to hunt without the permission of the private landowners, 420 U.S. at 207, n. 11, this Court held that the application of state law to tribal hunting and fishing rights was precluded. Thus, *Antoine* establishes firmly that the treaty right to hunt and fish free from state regulation may exist on lands in which the Indians have no right, title, and interest.

A number of lower courts have likewise recognized that Indian hunting and fishing rights are not necessarily appurtenant to the land. *See Settler v. Lameer*, 507 F.2d 281 (9th Cir. 1974) (rejecting state's argument that Tribe retained only proprietary right to hunt and fish off reservation but necessarily surrendered regulatory right, *i.e.*, to hunt and fish free of state regulation); *Lac Courte Orielles Band v. Voigt*, 700 F.2d 341, 352 (7th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S. Ct. 53 (1983) (Treaty hunting and fishing rights on ceded public lands in northern third of Wisconsin "not dependent on either the Indians' title or right to permanently occupy the land in which it was to be exercised."); *Lower Brule Sioux Tribe v. State of South Dakota*, 711 F.2d 809, 823 (8th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S. Ct. 707 (1984) (treaty rights to hunt and fish free of state regulation on lands taken by United States for dam and reservoir purposes "are severable from their treaty rights to *exclusively* own, occupy and utilize the land granted to them as a reservation.").

b. Tribal Retention Of Hunting And Fishing Rights Is Compatible With The Purposes Of The Cession And The Status Of The Ceded Lands.

The legislative history and surrounding circumstances of the 1906 Act show a clear congressional purpose to honor the United States' obligations under the 1864 Treaty. While the purpose of the 1906 Act *was* to honor federal treaty obligations and benefit the Indians, one of its purposes *was not*, like the majority of other turn of the century cession agreements, to open the Reservation for entry and settlement by non Indians. The 1906 Senate Committee Report quotes the Secretary of the Interior's transmittal letter, noting that only 7,080 acres (slightly over one percent) had been taken up by settlers. S. Rep. No. 198, *supra* at 8. Moreover, prior to the time Congress ratified the 1901 Agreement, it had already withdrawn virtually all of the ceded lands from entry and placed them in national forests or Crater Lake National Park (J.A. 1314, Stip, 14 18).

Retention of Treaty rights to hunt, fish, gather and trap on unsettled public forest lands or private forest lands with the landowner's permission is consistent with the Tribe's cession of title and exclusive rights of occupancy. *Kimball v. Callahan*, 493 F.2d 564 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974) (Kimball I) (terminated Klamath Indians retain non exclusive rights to hunt and fish free of state regulation on former reservation lands now mostly within national forest). *United States v. Adair*, 478 F. Supp. 336, 346, n. 5 (D. Or. 1979), *mod.* 723 F.2d 1394 (9th Cir. 1984), *cert. denied*, ___ U.S. ___ (1984) ("Government's current uses of the Marsh and forests of the

[Klamath] Reservation are consistent with the Indians' claims [to sufficient water for game and fish resources, in this action . . . *See Lower Brule Sioux Tribe v. State of South Dakota*, 711 F.2d 809, 817-18 (8th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 707 (1984) (Government's use of lands for dam and reservoir purposes "not inconsistent with the federal government's purpose in acquiring the property, as might be the case if, for example, the reservation was acquired to permit settlement by non Indians.").

Indeed, numerous Indian tribes retained rights to hunt and fish even on lands ceded for the purpose of non Indian settlement as long as those lands remained public lands of the United States, or as long as they remained unsettled.[7] The Supreme Courts of Montana and Idaho have held, as has a federal district court, that such treaty rights preclude state regulation of Indian hunting and fishing on ceded lands now in national forests. *State v. Stasso*, 172 Mont. 242, 563 P.2d 562 (Mont. 1977) (Treaty with Flatheads, 12 Stat. 975); *State v. Tinno*, 94 Idaho 759,

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[7] *See, e.g.*, Treaty with the Cherokee (1798), 7 Stat. 62; Treaty with the Koskaska 303), 7 Stat. 78; Treaty with the Sauk and Foxes (1804), 7 Stat. 84; Treaty with the Plankashaw (1805), 7 Stat. 100; Treaty with the Ottawa (1807), 7 Stat. 105; Treaty with Chippewa (1808), 7 Stat. 112; Treaty with the Wyandot (1817), 7 Stat. 160; Treaty with the Ottawa (1821), 7 Stat. 218; Treaty with the Miami (1826), 7 Stat. 300; Treaty with the Potowatomi (1832), 7 Stat. 378; Treaty with the Makah (1855), 12 Stat. 939; Treaty with the Walla Walla (1855), 12 Stat. 945; Treaty with the Yakima (1855), 12 Stat. 951; Treaty with the Nez Perce (1855); 12 Stat. 957; Treaty with the Flatheads (1855), 12 Stat. 975; Treaty with the Navajo (1868), 15 Stat. 667; Treaty with the Shoshoni (1868), 15 Stat. 673.

497 P.2d 1386 (Idaho (1977) (Treaty with Eastern Shoshoni, 15 Stat. 673); *State v. Arthur,* 261 P.2d 135 (Idaho 1953), *cert. denied,* 547 U.S. 967 (1964) (Treaty with Nez Perce, 12 Stat. 957); *Confederated Tribes of the Umatilla Indian Reservation v. Maison,* 262 F. Supp. 874 (D. Or. 1966), *aff'd sub nom. Holcomb v. Confederated Tribes,* 852 F.2d 1013 (9th Cir. 1967) (Treaty with the Walla Walla, 12 Stat. 945). These cases demonstrate that Indian hunting and fishing free from State regulation on national forest lands is not a novel proposition.

2. Neither The Eighth Circuit's Ruling In *Red Lake* Nor This Court's Ruling In *Rosebud Sioux Tribe v. Kneip,* Is Inconsistent With The Ruling Below.

The state relies on *United States v. Minnesota,* 466 F. Supp. 1382 (D. Minn. 1979); *aff'd sub nom. Red Lake Band of Chippewa Indians v. Minnesota,* 614 F.2d 1161 (8th Cir. 1980); *cert. denied,* 449 U.S. 905 (1980) (*Red Lake*) for the proposition that a cession of Indian title and diminishment of reservation boundaries necessarily results in abrogation of hunting and fishing rights (State's Brief at 24-26). However, *Red Lake* is distinguishable from this case in several important respects. First, *Red Lake* involved cessions of tribal land under general authority granted by the Nelson Act, the purpose of which was "to restore [Indian Reservation land] to the public domain and open it to settlement by whites." 466 F. Supp. at 1387. In contrast, the Klamath cession was accomplished pursuant to a special act of Congress, the purpose of which was to finally settle a boundary dispute and honor treaty obligations. Opening the lands to settlement was clearly

not a purpose of the 1901 Klamath cession; the lands were immediately placed in national forests or parks.

Secondly, the *Red Lake* court made no distinction between the right to hunt and fish free of state regulation (a regulatory right), and the right to enter upon private land to hunt and fish over the landowners' objection (a property right). Indeed, the entire *Red Lake* analysis is premised on the characterization of the right asserted by the Indians as an interest in property, *i.e.,* appurtenant to the land itself: "These rights are mere incidents of Indian title . . . " 466 F. Supp. at 1385.[8] As the Tribe has demonstrated, however, Indian hunting and fishing rights are a hybrid mixture of proprietary and jurisdictional interests and thus a right to hunt and fish free of state regulation is a right separate and apart from an interest in the property itself. In *Lower Brule Sioux Tribe v. State of South Dakota,* 711 F.2d 809 (8th Cir. 1983), *cert. denied,* ___ U.S. ___, 104 S.Ct. 707 (1984), the Eighth Circuit declined to follow its own *Red Lake* decision based upon that very distinction:

> The district court initially concluded that a finding of abrogation was supported by the plain language of the Fort Randall and Big Bend Acts. The court relied on *Red Lake* . . . to state that "[i]t has been held that statutes which remove 'all right, title and interest' of a tribe in certain land operate to extinguish hunting and fishing rights in the land."

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[8] In *Red Lake* the Tribe and the United States likewise made no such distinctions in asserting their claims. They simply argued that the Red Lake Band retained its treaty rights unaffected by the cession and opening of the Reservation for settlement.

> Then citing statutory language in the Fort Randall Act (section 1) referring to the "settlement of all claims, rights and demands" arising from the project's construction, and in the Big Bend Act (section 1(a)) referring to a taking of the Tribe's "entire interest" in the specified land, the court concluded that these provisions alone "may be * * * sufficient indicia of congressional intent to extinguish treaty hunting and fishing rights of the Tribe within the taken area." We cannot agree.
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> . . . [the district court] . . . failed to recognize that the Tribe's treaty hunting and fishing rights are severable from their treaty rights to *exclusively* own, occupy and utilize the land granted to them as a reservation. . . .

711 F.2d at 822-23 (citations and footnote omitted, emphasis in original).[9]

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[9] The *Lower Brule* court also relied on the fact that the congressional taking acts there had not resulted in a diminishment of the Reservation boundaries as they had in *Red Lake*. Here, of course, the 1901 cession did result in diminishment of the Klamath boundaries. The Eighth Circuit makes it plain, however, that diminishment is the determinative inquiry only in the absence of federal law preserving the rights:

> If either Act disestablished the reservation boundaries, the application of state law on the land taken by that Act no longer would be preempted, and South Dakota would have jurisdiction to regulate hunting and fishing by tribal members on that land *absent federal law preserving the Indians' hunting and fishing rights.*

711 F.2d at 815, *citing* Menominee Tribe v. United States, 391 U.S. 404 (1968) (emphasis added). Here, because the Reservation was not opened for settlement, Article IV preserves the Tribe's rights

There is a substantial difference between asserting a retained property right to hunt and fish over the objection of the landowner on land which has been opened for settlement, as was the case in *Red Lake*, and asserting a right to hunt and fish free of state regulation on national forest lands or private forest lands with the consent of the landowners, as is the case here. *See Antoine v. Washington, supra*, 420 U.S. at 207 n. 11. The rights asserted by the Tribe here are consistent with the 1901 cession and are therefore preserved by Article IV of the agreement.

The State argues, however, that this Court's decision in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 581 (1977), in dictates that Article IV has no application in this case (Br. 33-34). Each cession agreement in *Rosebud*, like the Klamath cession agreement, contained a provision preserving any treaty right not inconsistent with the provisions of the agreement. In *Rosebud*, the Tribe had argued that the treaty right to the reservation boundary as described in the Treaty was consistent with the purpose of the cession and therefore was preserved by Article V, the provision similar to Article IV of the Klamath cession agreement. The Indians' argument in *Rosebud* was rejected and because this Court's opinion did not mention Article V, the State concludes therefrom that Article IV has no real significance in this case.

However, the *Rosebud* Court found that one of the very purposes of the Rosebud cession agreement was to diminish the Reservation boundary. Thus, by that fact

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as does the rule of *Menominee Tribe, supra*, that Treaty rights will not be abrogated by implication.

alone, Article V could not work to preserve the Rosebud Indians' right to the Treaty-described reservation boundary. In this case, the pre-existing treaty right claimed to be preserved by Article IV is not a *sine qua non* of the cession agreement.[10] The Klamath Tribe concedes that its Reservation was diminished by the 1906 Act. Thus, the opinion here is, assuming diminishment, whether the survival of tribal rights to hunt and fish is consistent with this cession.

Rosebud establishes that the question of diminishment is separate from the question of whether, notwithstanding diminishment, any beneficial interest has been retained by the Indians. Citing the lower court's ruling in *Rosebud*, the Court made clear that "the fact that a beneficial interest is retained does not erode the scope and effect of the cession made, or preserve to the reservation its original size, shape, and boundaries." 430 U.S. at 601, n. 24 citing *Rosebud*, 521 F.2d 87, 102 (9th Cir. 1975).[11]

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[10] Only after the purpose of the cession has been determined can Article IV have any meaning. Thus, Article IV does not aid in determining the central purpose of the cession, but once that purpose is determined, it does operate to preserve rights consistent with that purpose.

[11] *Rosebud* also relied on Ash Sheep Co. v. United States, 252 U.S. 159 (1920), where it was held that notwithstanding that the Indians had relinquished their possesory [sic] right to a portion of their reservation, any benefits which might be derived from the use of the land belonged to the beneficiaries and not the trustee until the lands were actually sold. Therefore, the lands were not public lands for purposes of sheep grazing. The cession agreement in *Ash Sheep* was in all material respects similar to that in *Rosebud*.

Rosebud refutes the State's argument that the cession of all right, title, and interest to the land is necessarily inconsistent with a right to be free from state regulation

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Portions Of The February 7, 1996, Rebuttal Report Of The State's Expert Historian, Alan S. Newell, Adopted As Testimony

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

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White fails to distinguish between fee-patented allotments and those that were still held in trust by the United States. Moreover, he does not evidence an understanding of the impact this difference played in the application of state conservation laws (pp. 96. 106).

"Competency" and the ability to manage one's affairs were seen by federal officials as evidence of an Indian's susceptibility to state law. Consequently, the ownership status of an individual's land, whether in fee simple or trust was an important criterion in deciding whether or not state conservation laws applied to that individual when hunting and fishing on those allotted lands. For much of the early twentieth century, both federal and state authorities began their investigation of a specific hunting and fishing violation by first inquiring as to the wardship status of the alleged Indian offender. Only when criticism of allotment began to resonate in the late 1920s did Indian officials place less emphasis on the land status of Indian allottees and, instead, focus on their tribal relations.

3.0 Federal Support of State Conservation Law

Federal emphasis on Indian individualism and citizenship during the first decades of the twentieth century prompted policy makers to defer to state law. The prominent role that states, such as Minnesota, played in the conservation movement understandably motivated Interior Department and other officials to encourage tribal members to conform to state game and fish laws. This was a phenomenon that found expression nationally and one that Bruce White ignores in his essay.

In his 1894 annual report, Commissioner of Indian Affairs D.M. Browning addressed a recurring problem of Indians destroying game in violation of the game laws outside reservation boundaries in a number of western states. Browning's comments were prompted by a report that Indians on the Wind River Reservation in Wyoming had killed a large number of elk and deer in violation of Wyoming game laws. Browning had received similar complaints from individuals in other states, including Idaho and Montana that Indians were slaughtering game in large numbers ostensibly for sale to non-Indian markets. Browning worried that if these charges proved to be true it would lead to serious confrontations between Indians and white settlers.[8]

Commissioner Browning issued a directive to Indian agents telling them to inform the Indian people at their

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[8] D.M. Browning, ARCIA, 1894, *House Executive Document* 1, 53d Cong., 3d Sess., serial 3306 (Washington D.C.: GPO, 1895), p. 66.

agencies that if they continued to abuse the pass privileged hunting while off the reservation, their passes would be revoked and they would be confined to the reservations. Browning advised the agents that they should emphasize to the Indians that in 1889, his predecessor T.J. Morgan, in response to similar complaints, had issued a circular to all agents outlining the Indian Office's policy regarding off-reservation hunting. At that time Morgan advised the agents that some Indian tribes, because of treaty stipulations, had a "guaranteed right to hunt, upon specified conditions, outside their existing reservations." However, Morgan informed the agents that the secretary of the interior had decided that there was a conservation limit to this activity and that:

> . . . the privilege of hunting under such treaty provisions is the right to merely kill such game as may be necessary to supply the needs of the Indians, and that the slaughter of wild animals in vast numbers for the hides only, and the abandonment of the carcasses without attempting to make use of them, is as much a violation of the treaty as an absolute prohibition on the part of the United States against the exercise of such a privilege would be.[9]

For Indian tribes who did not have a treaty right to hunt off their reservation, Morgan told the agents that these Indians should be prevented from leaving their reservation to hunt since " . . . they are liable to arrest and prosecution for violation of the laws of the State or Territory in which offenses may be committed."[10]

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[9] *Ibid.*, p. 67.

[10] *Ibid.*

The policy outlined by Commissioner Morgan in 1889, and reinforced by Commissioner Browning five years later, guided the Indian Office's response to violations of state game laws, committed by Indians off the reservation well into the twentieth century. A review of several incidents, involving Indians arrested for, or accused of, violating game laws in states other than Minnesota, emphasizes that this policy was pervasive and consistent at the turn of the century.

In November, 1898, Commissioner of Indian Affairs W.A. Jones, Browning's successor, wrote to Edward Mills, the Indian agent at the Tulalip Indian Agency in the state of Washington. Jones advised Mills that the commissioner of the General Land Office (GLO) had recently informed the secretary of the interior that there had been reports of Indians killing game and causing fires on forest reserves throughout the nation. The GLO commissioner suggested that the Indian Office instruct their agents to tell the Indians that the state or territorial laws regarding game and fish " . . . control within the several [forest] reservations." Jones told Mills that the Indians at Tulalip should be " . . . fully warned against going upon any forest reservations to hunt in violation of state game laws."[11] He recommended that Mills attempt to prevent the Indians at his agency from ever hunting on an established

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[11] Commissioner of Indian Affairs [CIA] W.A. Jones to Edward Mills, Agent, Tulalip Agency, November 18, 1898, in letters from the Commissioner July 5, 1898-January 25, 1899 (1 vol.), Box 10, Records of Tulalip Agency, Records of the Bureau of Indian Affairs [BIA], Record Group [RG 75], National Archives – Pacific Northwest Regional Branch, Seattle, Washington [NA-PNRB].

forest reserve since " . . . such hunting is a continual source of complaint: and when they hunt out of season and thereby violate the state game laws, they are liable to arrest and punishment by the state authorities.[12]

Many of the Indian tribes in Washington had a treaty right to hunt and fish "exclusively" within the boundaries of their reservations as well as "in common" with non-Indians at "usual and accustomed" places off of their reservation. The issue of the exact location of these places often led to controversy between state game officials and Indians arrested for violating game laws. The federal government normally intervened on behalf of the Indians in these cases because of the indefinite location of their off-reservation rights. However, the Indian Office maintained that, despite the treaty-based rights, Indians were required to comply with state fish and game laws while hunting or fishing off the reservation. For example, in 1913, the commissioner of Indian affairs wrote to James Goudy and Henry Sicade, two Indians under the jurisdiction of the superintendent of the Cushman School in answer to their query regarding off-reservation hunting and fishing rights.[13] The two Indians had written the

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[12] Ibid.

[13] Cushman School was located in Tacoma, Washington and had formerly been known as the Puyallup School. The superintendent of the Puyallup School had been assigned the duties of acting as the agent for a number of Indian tribes including: Quinault, Puyallup, Chehalis and others. See Edward E. Hill, compiler. *Guide To Records In The National Archives Of The United States Relating To American Indians* (Washington: National Archives and Records Service, General Service Administration, 1981), p. 178.

commissioner in October of that year asking whether various state laws had eliminated their right to hunt and fish at their usual and accustomed places. In his response Commissioner Sells indicated that, although the 1854 treaty with the Nisqually secured this right, the right was to be shared in common with all citizens. Sells stated that:

> It appears that the Indians at no time had a greater right than the citizens of the Territory, for which reason they would not now have greater rights than the citizens of the State since it has been admitted to the Union. Therefore, whatsoever laws the State chooses to make for the Government of its citizens in respect to fishing, hunting, etc., will apply with like force to the Indians.[14]

In 1908, a confrontation between Indians and Montana game wardens turned decidedly violent. The wardens attempted to arrest several Indians from the Flathead Indian Reservation who were hunting off the reservation. A gun battle ensued and four of the Indians and one game warden died. Acting Commissioner of Indian Affairs R.G. Valentine wrote to the secretary of the interior to say that he [Valentine] was awaiting a full report from the agent on the Flathead Reservation. Valentine then reviewed for the secretary the evolution of the Indians' rights to hunt and fish under the terms of the 1855 Hellgate treaty. The commissioner noted that the treaty allowed the Indians the "exclusive" right to fish on

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[14] CIA to James Goudy and Henry Sicade, date illegible, 42352-09-Puyallup-115, Central Classified Files [CCF] 1907-1939, BIA, RG 75, National Archives, Washington, D.C. [NA].

the reservation and the right to fish at their "usual and accustomed" places "in common with citizens of the Territory" and "the privilege of hunting . . . upon open and unclaimed land". He concluded that if the Indians were in fact off the reservation they "would have no right to kill deer within the limits of the State in violation of the State laws."[15]

Several years later, Assistant Commissioner of Indian Affairs E.B. Meritt responded to an inquiry from Sam Resurrection, an Indian living at Arlee, Montana, on the Flathead Reservation. Resurrection had written the Indian Office claiming that the 1855 treaty with the Flatheads had assured them the right to hunt and fish off the reservation without restrictions. Meritt agreed that tribal members had an exclusive right to fish on the reservation. However, he contended that " . . . outside the reservation they were only given equal rights with the whites in regard to fishing, hunting, gathering roots and berries and pasturing horses and cattle." Meritt advised Resurrection that " . . . if the white citizens of the States are required by State law to obtain licenses and comply with certain laws and regulations relative to hunting and fishing, the Indians are under obligation to comply with the same requirements."[16]

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[15] Acting CIA R.G. Valentine to the Secretary of the Interior [SOI], December 3, 1908, File 5-1 Part 1, Flathead File-Hunting & Fishing, Mar. 27, 1904 to Nov. 30, 1936, CCF 1907-1936, Records of the Office of the Secretary of the Interior, RG 48, NA.

[16] Asst. CIA E.B. Meritt to Sam Resurrection, July 3, 1915, File 920-Conservation of Fish and Wildlife (Legal Matters), Box 320. Flathead Agency Records, BIA, RG 75, NA-PNRB.

These examples demonstrate that federal officials deferred to state officials when it came to enforcing conservation laws. They did so for conservation and other reasons. This policy was well established at the turn of the century, as enunciated by the commissioner of Indian affairs.

4.0 Federal Policy And The Application of State Conservation Laws To Chippewa In Minnesota: 1890-1940

Federal officials applied this national position to Chippewa in Minnesota during the first half of the twentieth century. Although there were distinguishing aspects of the policy in the state that reflected administrative responses to particular questions, the underlying precepts of the federal approach did not differ from that applied in other parts of the country. That policy, as expressed in the correspondence of federal officials had three primary tenets:

1) Chippewa could hunt and fish in Minnesota on reservation lands that were tribal or held in trust for an allottee by the United States;

2) Chippewa could hunt and fish on non-Indian land within the reservation (allotted land that had passed to fee status or land owned by non-Indians on "opened" reservations) and outside of the reservation boundaries only if they did so under state law;

3) Chippewa who signed the treaties of 1837 and 1842 treaties had a right to hunt and fish

within the ceded area "in common" with other state citizens.[17]

From the mid-1910s to 1940, Department of the Interior and Department of Justice personnel generally followed the precedent enunciated in three cases in support of this policy. The 1901 decision in the case of *In re Blackbird* affirmed the department's view that an "Indian has the right to hunt and fish within his own reservation notwithstanding the State hunting and fishing laws when the game and fish are for his own use."[18] The conditional

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[17] CIA Cato Sells to John Grasshopper, April 23, 1920, 39624-1920-Fond du Lac-115; CIA Charles H. Burke to Peter R. Wadsworth, September 26, 1922, 71577-1922-Consolidated Chippewa-115; Asst. CIA E.B. Meritt to Albert F. Porter, October 16, 1922, 77994-1922-Consolidated Chippewa-115; Asst. CIA E.B. Meritt to J.A. Wakonabo, May 22, 1924, 35891-1924-Consolidated Chippewa-115; Office of Indian Affairs Counsel John R.T. Reeves, "Chippewa Indians' Hunting and Fishing Rights," ca. 1924. 20940-Great Lakes-931; Asst. CIA E.B. Meritt to James Bassett, November 6, 1923, 82333-1923-Consolidated Chippewa-115; CIA Charles H. Burke to John Morgan, November 29, 1927, 53455-1927-Consolidated Chippewa-115, all in CCF 1907-1939, BIA. RG 75, NA.

[18] In the Blackbird case, decided on June 6, 1901, John Blackbird, a Chippewa who resided on the Bad River Indian Reservation in Wisconsin, was arrested by a state game warden for fishing with nets on a small stream within the reservation. Unable to pay the fine, Blackbird was sentenced to 30 days' hard labor in the Ashland County jail. District Judge Bunn ordered him released from prison, having determined that state fish and game laws did not extend to "Indians maintaining their tribal relations and residing upon Indian reservations within the limits of the state." Finding that the arrest had resulted from the warden's "overzeal," Judge Bunn also observed that Blackbird was merely supplementing a typically meager diet with small fish that could only be caught with spears or nets. *In re Blackbird*,

aspect of this statement reflected the Indian Office's position that Indian hunting and fishing should be for subsistence rather than commercial purposes.[19]

The 1896 United States Supreme Court decision in *Ward v. Racehorse* helped form the underpinning for the federal government's view that Chippewa were subject to state law when off the reservation.[20] As Bruce White discusses in his report (White, pp. 46-51), the conviction of two Fond du Lac Chippewa, Albert Porter and John McCarthy, for possessing "a saddle of venison" while off

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109 F. 139, 140, 145 (1901). Direct quotation from Asst. CIA E.B. Meritt to Cohen S. Pamossigay, July 5, 1923, 44729-1923-Consolidated Chippewa-115; see also Reeves, "Chippewa Indians' Hunting and Fishing Rights," ca. 1924, 20940-Great Lakes-931, both in CCF 1907-1939, BIA. RG 75, NA.

[19] See for example, Supt. E.A. Allen, "To All Chippewas of the Consolidated Agency, May 27, 1927, 27048-1927-Consolidated Chippewa-115; Supt. E.A. Allen, Consolidated Chippewa Agency, to CIA, July 13, 1927, 30457-1927-Consolidated Chippewa-115; Asst. CIA J. Henry Scattergood to Sen. Henrik Shipstead, September 13, 1929, 40932-1929-Consolidated Chippewa-115, all in CCF 1907-1939, BIA, RG 75, NA.

[20] In *Ward v. Racehorse*, 163 U.S. 504 (1896), Racehorse, a member of the Shoshone Bannock Tribe, was jailed for taking elk in violation of Wyoming law, on land ceded by the Tribe to the United States. Under a treaty with the United States, the Tribe had reserved the "right to hunt on the unoccupied land of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts." In a federal habeas corpus action, Racehorse successfully claimed that the treaty provision allowed him to take elk. The United States Supreme Court reversed that decision, ruling that tribal members were subject to Wyoming's game laws, despite the treaty provision.

the reservation prompted federal Indian officials in Washington, D.C. to affirm this position in 1897. White discusses how United States District Attorney E.C. Stringer was reported to have claimed in an argument to the Minnesota Board of Pardons that the two Chippewa had reserved rights to hunt and fish off the reservation "[u]nder the treaties that the government made with the Indians of the old Northwest territory in 1794, and later in 1838 and 1855."[21] Stringer apparently explained his position in more detail to a reporter when he described Article 11 of the "Treaty of 1855" that reserved the right to hunt and fish in the territory ceded in that agreement "until otherwise ordered by the President."[22] Stringer believed that there had never been a presidential proclamation revoking this provision or those of other Chippewa treaties.

White suggests that Minnesota's prosecution of Porter and McCarthy helped forge law that circumvented Chippewa treaty rights on ceded land (White, p. 46). Yet, it was the federal government that quickly and decisively put E.C. Stringer's argument to rest. A few days after the

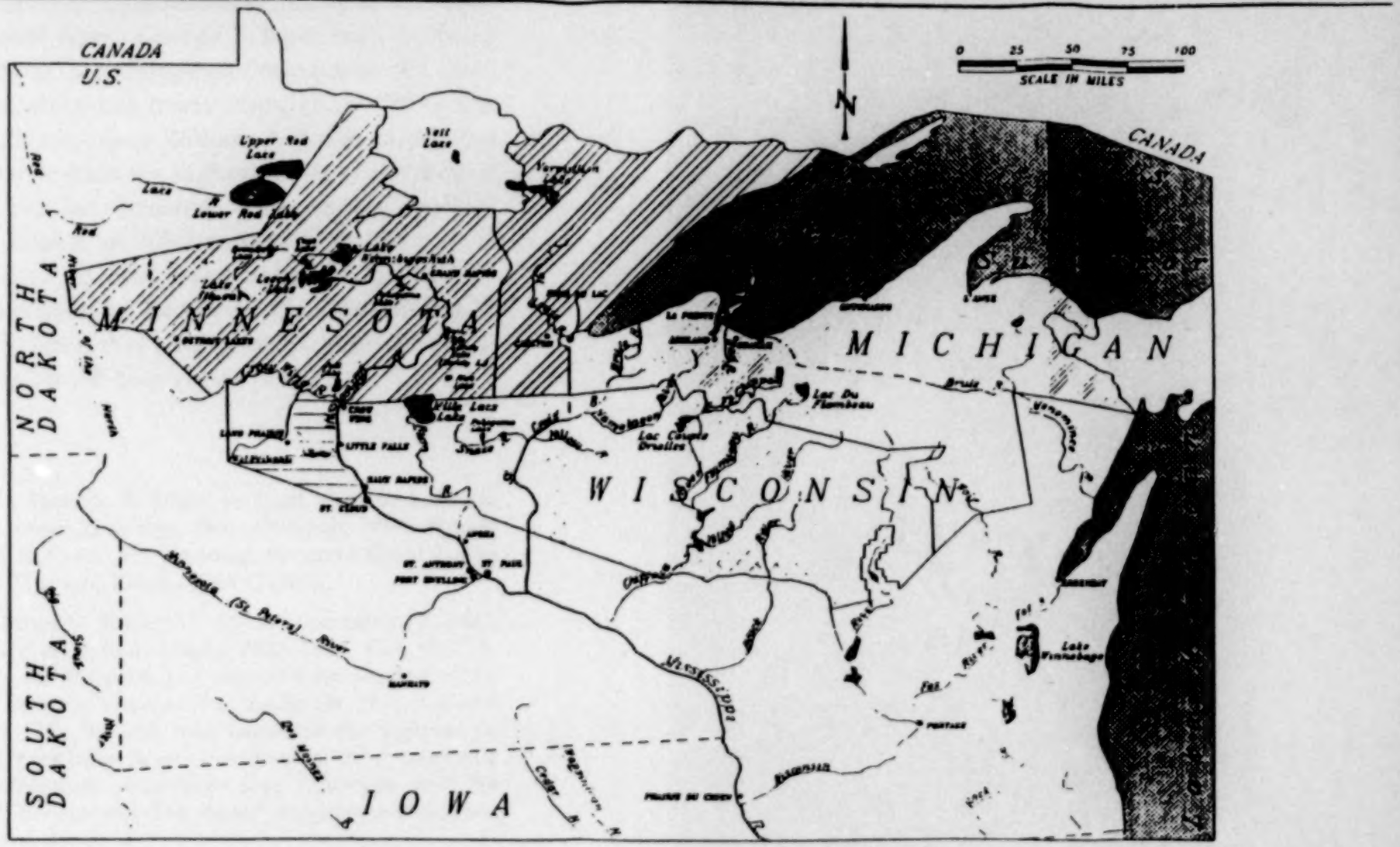
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[21] Article enclosed in Capt. G.L. Scott, Indian Agent, to CIA, April 17, 1897, 15173-1897, Letters Received, Office of Indian Affairs, 1881-1907, BIA, RG 75, NA. (The firm, Beaulieu and Campbell sent Scott the clipping, see Beaulieu and Campbell to Scott, April 15, 1897.)

[22] Ibid. The ceded territory included only the northeastern portion of Minnesota (see Map 1). "Treaty With The Chippewa," September 30, 1854, Charles J. Kappler, compiler and editor, *Indian Affairs, Laws and Treaties*, 5 vols., *Treaties*, Vol. II (Washington: GPO, 1904), pp. 648-52.

1875

CHIPPEWA LAND CESSIONS IN NORTHERN WISCONSIN & MINNESOTA



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press account, Acting Commissioner Thomas P. Smith instructed LaPointe Agent George L. Scott that, pursuant to *Ward v. Racehorse,* the Chippewa "must obey the State laws, notwithstanding the treaty stipulations."[23] A few months later, Commissioner William A. Jones responded to apparent pressure from the highest levels of the federal government when he directed White Earth Agency Superintendent Robert M. Allen to inform the Chippewa and Indian traders to obey state conservation laws.[24] Following the decision in *Racehorse,* the Department of the Interior relied upon that case as justification for deferring to state law on off-reservation lands.[25]

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[23] Acting CIA Thomas P. Smith to Capt. George L. Scott, April 29, 1897, Letters Received, Dec. 1896-July 1898, Box 9, LaPointe Agency, BIA, RG 75, National Archives-Great Lakes Regional Branch, Chicago, Illinois [NA-GLRB].

[24] CIA W.A. Jones to Robert M. Allen, September 22, 1897, Letters Sent. Office of Indian Affairs, 1881-1907, BIA, RG 75, NA. *Forest and Stream,* the principal conservation journal of the period, reported that the attorney for the Board of Game and Fish Commission, T.E. Byrnes, had garnered the support of President William McKinley in an effort to stop the market sale of game from Minnesota reservations to "Chicago and the Eastern cities." "Chicago and The West," in *Forest and Stream,* October 2, 1897, vol. 49, p. 267.

[25] For example, in 1908, in regard to Flathead Indians' treaty right to hunt on "open and unclaimed" land off their reservation, Acting Commissioner R.G. Valentine noted that *Ward v. Racehorse* determined that Indians did not have a right to hunt outside the border of their reservation in violation of Montana's game laws. Acting CIA R.G. Valentine to SOI, Dec. 3, 1908. File 5-1, Part 1, Flathead File-Hunting & Fishing, Mar. 27, 1904 to Nov. 30, 1936. CCF 1907-1936, Records of the Office of the Secretary of the Interior, RG 48, NA.

A case that was argued before the United States Supreme Court in April, 1916 formed the third leg of the legal stool supporting the federal policy *vis a vis* Chippewa hunting and fishing. Assistant Commissioner of Indian Affairs E.B. Meritt advised William Rice of Odanah, Wisconsin in June, 1916, that his department was awaiting a decision by the court on a recent New York case before advising the Wisconsin Chippewa of their off-reservation fishing rights. That decision, in *Kennedy v. Becker* held that tribal Indians were subject to state fish and game laws "notwithstanding the reservation of hunting and fishing rights contained [in a treaty]."[26] As was

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See also Reeves, "Chippewa Indians Hunting and Fishing Rights," ca. 1924, 20940-Great Lakes-931, CCF 1907-1939, BIA, RG 75, NA; Charles D. Mahaffie, Solicitor, Department of the Interior, to E.C. Bradley, Asst. to the SOI, May 1, 1917, pp. 5, 6; Mahaffie to SOI, Nov. 7, 1919, pp. 3-4, both in Box 62, Decimal Correspondence File 105-124, File: Hunting & Fishing 115, Consolidated Chippewa Files, BIA, RG 75, National Archives – Central Plains Region, Kansas City, Missouri [NA-CPR].

[26] Direct quote in Meritt to Pamossigay, July 5, 1923; Asst. CIA E.B. Meritt to William Rice, June 7, 1916, 50256-1916-LaPointe-115; 44729-1923-Consolidated Chippewa-115, both in CCF 1907-1939, BIA, RG 75, NA.

In *Kennedy v. Becker*, decided on June 12, 1916, the Supreme Count ruled that a fishing right on lands ceded by the Seneca to Robert Morris by the treaty of September 15, 1797 (7 *Stat.*, 601) was only held "in common" with grantees and their heirs. Three Seneca Indians who resided on the Cattaraugus Indian Reservation in New York were arrested for spearing fish in an area within these ceded lands, outside of their reservation. Citing *Ward v. Racehorse*, the Court held that "the power to preserve fish and game within its borders is inherent in the sovereignty of the State." Acknowledging that, at the time of treaty negotiations, the Indians were not "concerned with the

the case with the *Racehorse* decision, the opinion in *Kennedy* helped form and support the federal view that Chippewa were subject to state conservation laws when on ceded land.[27]

Indian Office officials strongly supported the application of state law to Chippewa in Minnesota for reasons other than the legal precedent. They also felt a strong conservation need to buttress the state's efforts to regulate the harvest of wildlife resources. This is partly evidenced by their focus on Indian hunting and fishing principally for subsistence purposes, rather than for the commercial sale of game and fish. It also can be seen in numerous responses to inquiries from Chippewa and others in Minnesota.

E.A. Allen, Indian Agent for the Consolidated Chippewa Agency in Cass Lake, Minnesota, apparently

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necessary exercise of inherent power under modern conditions for the preservation of wild life." the Court contended, however, that "the sovereignty of the State was well understood, and this conception involved all that was necessarily implied in that sovereignty, whether fully appreciated or not." 241 U.S. 556, 563 (1916).

[27] For example, see Charles D. Mahaffie to SOI, Nov. 7, 1919, Box 62, Decimal Correspondence File 105-124 Files, Hunting and Fishing 115, Consolidated Chippewa Files, BIA, RG 75, NA-CPR, p. 4; E.B. Meritt to P.J. Brunette, Dec. 5, 1921, 98263-1921-White Earth-115, Box 21, BIA, RG 75, NA-CPR; CIA Charles H. Burke to Peter Wadsworth. Supt., Consolidated Chippewa Agency, Sept. 26, 1922, 71577-1922-Consolidated Chippewa-115, Box 4028, RG 75, NA-CPR: Lafayette French, Jr., U.S. Attorney, to E.A. Allen, Supt., Consolidated Chippewa Agency, Feb. 26, 1926, 21115-1926-Consolidated Chippewa-115, CCF 1907-1939, BIA, RG 75. NA.

sparked some interest in this issue when he distributed a circular to agency Chippewa in May, 1927. In his bulletin, Allen reminded the Chippewa that they must obey state law, particularly with respect to the selling of fish and game on the open market. Responding to an individual inquiry about this circular, Assistant Commissioner Meritt noted that the increasing population in Minnesota made "the necessity for their [fish and game] conservation . . . more apparent." Meritt acknowledged that:

> While ward Indians as a general rule are allowed to hunt and fish within the limits of their present reservation on restricted Indian land and on their own trust allotments, for which fee patents have not been issued, whenever necessary for food purposes, they should not, however, take more game and fish than necessary for their own use; and to prevent extermination and insure a further supply, they should while hunting on the reservation comply with the state game laws as much as possible.[28]

A few days later, Meritt emphasized this point in a letter to David Boyd at Cass Lake when he stated that "In order that game and fish may not become entirely extinct they [Chippewa] should also comply with the State game laws and regulations as far as practicable on the reservation."[29]

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[28] Asst. CIA E.B. Meritt to Eugene Quade, June 11, 1927; E.A. Allen. "To All Chippewas of the Consolidated Agency," May 27, 1927, both in 27048-1927-Consolidated Chippewa-115, CCF 1907-1939, BIA. RG 75, NA.

[29] Asst. CIA E.B. Meritt to David C. Boyd, June 18, 1927, 28482-1927-Consolidated Chippewa-115, CCF 1907-1939, BIA, RG 75, NA.

Contrary to the implication in Bruce White's report, federal policy with respect to the application of state conservation law to Indians in general, and to the Minnesota Chippewa in particular, was well formed by 1920. It was a policy that had firm roots in Indian reformers' efforts to acculturate Native Americans, as well as in a desire by federal officials to support state conservation movements. Incidents involving Chippewa hunting and fishing in Minnesota during the 1920s and 1930s were addressed by federal and state officials within this broad policy framework.

4.1 Criteria for Applying State Game Laws

Bruce White discusses some perceived disagreements between state and federal authorities over Chippewa hunting and fishing rights. He characterizes these as involving questions relating to Chippewa "treaty rights". As has been shown above, there was broad agreement among governmental officials on the applicability of state conservation law to the Chippewa. Contrary to White's argument, when disagreements did arise, they involved the ownership of the land on which the alleged offense occurred and on the status of the individual Chippewa. These were questions that generally stemmed from the way in which Indian land was alienated in Minnesota and not on specific clauses of earlier treaties.

Most of the Indian reservations that had been established in Minnesota in the 1850s and 1860s were later allotted and "opened" to non-Indian settlement (see Map 2). This fact caused much of the confusion about where state conservation laws were to apply to Chippewa.

Allotment and land alienations resulting from the Nelson Act of 1889 created a confusing checkerboard of jurisdiction. The establishment of the Minnesota National Forest in 1908 (later the Chippewa National Forest) only added to the complexity of land status in the northern areas of the state. The practical effect of these earlier actions was to make it difficult to determine the status of lands where an alleged Chippewa offense had occurred.[30]

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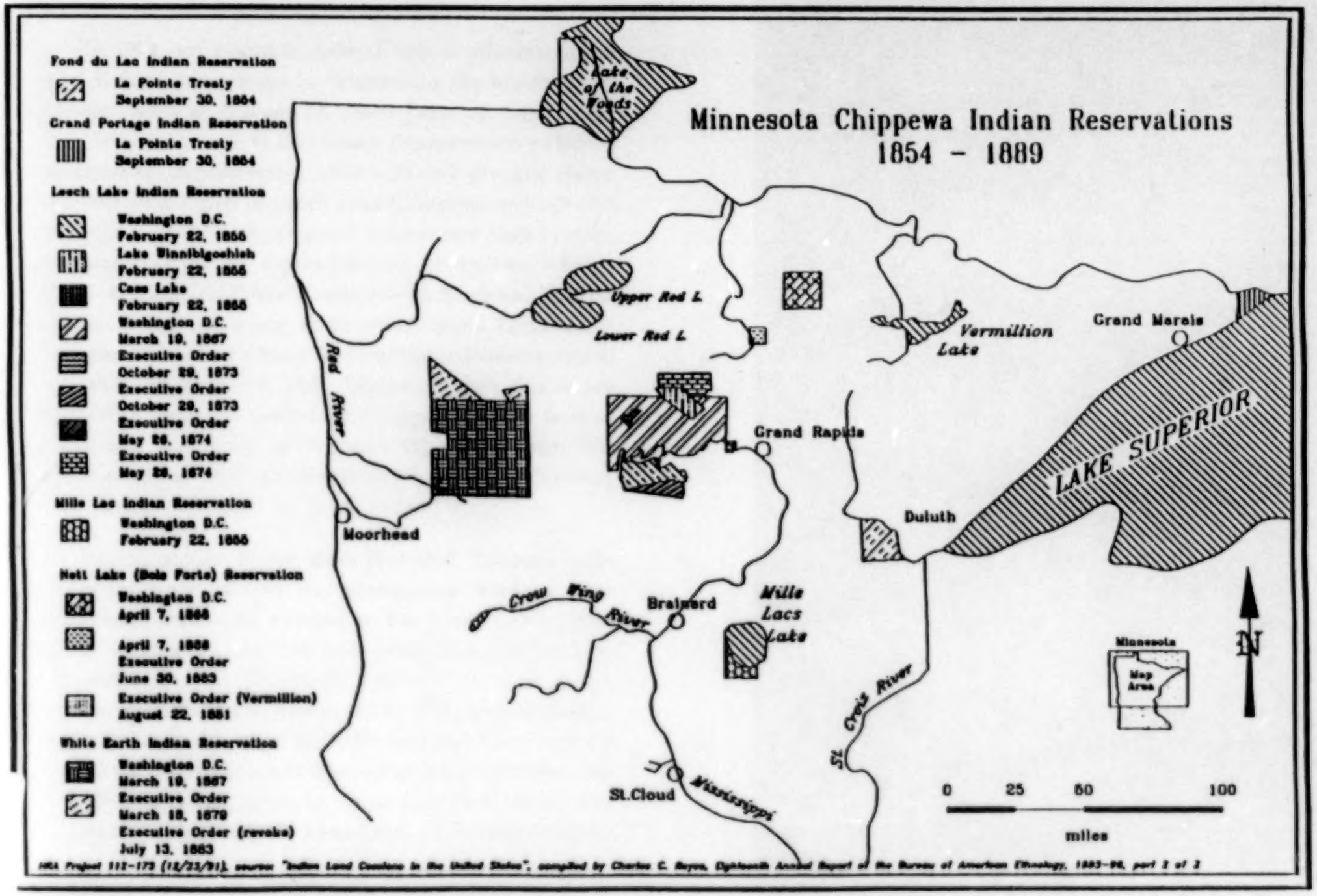
[30] Prior to 1889, the federal government had established at least sixteen (16) Indian reservations in Minnesota for the various bands of Chippewa: Cass Lake; Chippewa of the Mississippi; Duck Creek; Fond du Lac; Grand Portage; Gull Lake; Leech Lake; Mille Lac; Nett Lake; Pokegama Lake; Rabbit Lake; Red Lake; Rice Lake; Vermillion Lake; White Earth; and White Oak Point.

The Nelson Act of January 14, 1889 (25 *Stat.*, 642) provided that, after reaching an agreement for the cession of their reserved lands in the state not ceded previously, all of the Minnesota Chippewa, with the exception of those on the Red Lake Reservation, were to be moved to the White Earth Reservation. The law also provided that tribal members who moved to White Earth would be allotted lands there, but those who had already received allotments on the other reservations could not be moved without their consent. In addition, the statute authorized the allotment of lands on the Red Lake Reservation.

The Nelson Act established a Chippewa Commission (which became known as the Rice Commission) to negotiate the land cessions and to provide for allotments on the White Earth and Red Lake reservations. Although all the Chippewa bands consented to the land cessions, the majority of their members chose to remain on their old reserves rather than move to the White Earth Reservation. Consequently, the Chippewa Commission conceded to chose Indians who refused to move the right to accept allotments on their own reservations.

There was one additional area of general disagreement between state and federal officials that emerged during the late 1920s and early 1930s. State officials held to distinctions regarding fee-patented Indians after federal officials had abandoned those differences. This change in policy corresponded with the repudiation of allotment and the redefinition of wardship status that accompanied the administration of John Collier as commissioner of Indian affairs during the 1930s. Prior to this shift in federal Indian policy, the question of whether state game laws applied to Indians in Minnesota revolved consistently around two issues: the location where an offense occurred; and the wardship status of the Indian charged with an offense.

Following negotiations with the Chippewa Commission in 1889, the Red Lake Band also agreed in 1889 to accept a diminished land base. While the agreement they signed stipulated that the remaining Red Lake lands were "preserved for the purpose of fulfilling allotments," the Band steadfastly refused to accept any allotments. In contrast to the other Minnesota tribes, the Red Lake Band was distinct in their ability to continuously hold their reservation lands in common. Congress recognized the legal distinction of Red Lake Reservation in 1904 when it separated it from all agreements and claims pertaining to the other Minnesota Chippewa bands. The uniqueness of Red Lake as the state's only "unopened" Indian reserve was also noted by historian William Watts Folwell when he wrote in 1929 that the "resulting situation of the Red Lake Indians differs from that of the other Chippewa bands. As they have no allotments to sell, white men have not entered their reservation and spread themselves generally over it. It is still Indian country." William Watts Folwell, *A History of Minnesota*, Vol. IV (St. Paul: The Minnesota Historical Society, 1969), pp. 262, 297-299, 307.



Map 2.

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In 1922, for example, federal Indian officials examined both of these issues in determining the hunting and fishing rights of Indians at Leech Lake. A query from Wah-be-zah-sheence to Minnesota Representative Harold Knutson on September 4, 1922 initiated the discussion regarding the rights of Leech Lake Chippewa to hunt and fish. On September 9, Knutson transmitted Wah-be-zah-sheence's letter to Commissioner of Indian Affairs Charles Burke. In Burke's response to Knutson, he first observed that the treaty upon which many Leech Lake Chippewa relied as a basis for hunting and fishing rights was that of October 4, 1842. Explaining that this treaty did not apply to the Leech Lake Chippewa, Burke further noted that the treaty of February 22, 1855, which did apply to them, "did not specifically reserve any hunting and fishing privileges on lands ceded."[31]

Commissioner Burke then provided Knutson with the appropriate criteria for determining whether state game laws should be applied to the Leech Lake Chippewa. Burke explained that state game laws could not be enforced either on allotments still held in trust or on unallotted tribal lands, that is, lands within the boundary of an Indian reservation that still had not been allotted even if the reservation had been opened to settlement. On any off-reservation lands, or on fee-patented allotments, that is, on lands that had "passed to the jurisdiction of the

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[31] CIA Charles Burke to Rep. Harold Knutson, Sept. 20, 1922; Knutson to Burke, Sept. 9, 1922; Wah-be-zah-sheence to Knutson. Sept. 4, 1922, all in 72615-1922-Consolidated Chippewa-115, CCF 1907-1939, BIA, RG 75, NA.

States," Indians were required to observe state game laws.[32]

Because of federal distinctions between fee-patented Indians and those whose allotments were still held in trust, the citizenship status of the defendant Leech Lake Chippewa was also a determining factor. Assistant Commissioner Meritt asked the superintendent at the Consolidated Chippewa Agency, Peter Wadsworth, if the Leech Lake Chippewa in this incident, one Ben Cummings, was a citizen. Wadsworth's reply reveals some of the difficulty in applying this criterion: "In one sense I consider him a citizen Indian while in another sense he may not be considered a citizen." Technically, because Cummings's allotment was still held in trust, he had not yet become a citizen. Wadsworth worried, however, that this sometimes too fine a distinction would plague his ability to maintain law and order: "If we should tell non-citizen Indians that they do not have to obey the criminal laws of the state this would bring about a very bad condition here." Wadsworth further mentioned that he was corresponding with Carlos Avery, and that they were working together to "teach the Indians that they must begin to take on citizenship."[33]

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[32] CIA Charles Burke to Rep. Harold Knutson. Sept. 20, 1922, 72615-1922-Consolidated Chippewa-115, CCF 1907-1939, BIA, RG 75, NA.

[33] Asst. CIA E.B. Merritt to Peter R. Wadsworth, Supt., Consolidated Chippewa Agency, Oct. 9, 1922; Wadsworth to CIA, Oct. 13, 1922, both in 72615-1922-Consolidated Chippewa-115, CCF 1907-1939, BIA, RG 75, NA.

Discussion regarding the applicability of state game laws to a Chippewa Indian, in this case a Fond du Lac named Frank Barney in 1926, again revolved around where the alleged offense occurred and Barney's status as an allottee. Complicating this case was the fact that Barney was a fee-patented Indian who had committed the offense, the killing of a deer out of season, on his wife's restricted allotment. Superintendent E.A. Allen believed that where the offense occurred outweighed Barney's status and wanted to test the case in court. State officials were interested in cooperating to resolve the issue. In correspondence with United States District Attorney Lafayette French, Jr., Allen noted that State Game and Fish Commissioner James F. Gould also wanted to test the case, County attorney V.J. Michaelson had urged French to appeal the lower court decision, all the way to the Minnesota Supreme Court, if necessary. But French argued against doing so, reasoning that as soon as Barney became a fee-patented Indian he had become subject to state law. Barney's status as a citizen, according to French, took precedence over the location of the offense on a restricted allottment. Basing his opinion on Section 6 of the Dawes Act as amended by the Burke Act, French understood that, by this legislation, Congress intended to both protect the allottee whose land was still held in trust and to place fee-patented allottees under the jurisdiction of the laws of the states.[34]

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[34] Supt. E.A. Allen, Consolidated Chippewa Agency, to LaFayette French, Jr., U.S. District Atty., July 24, 1926; V.J. Michaelson, County Atty., to E.A. Allen, July 22, 1926; E.A. Allen to CIA, July 24, 1926; Asst. CIA E.B. Meritt to E.A. Allen, August 5, 1926; Lafayette French, Jr., to E.A. Allen, Aug. 13, 1926

The issue of hunting and fishing rights surfaced at Leech Lake in 1929. A Leech Lake Chippewa, Jim Green Hill, wrote to Minnesota Senator Henrik Shipstead, to explain that the state game warden had seized fishing nets and to seek Shipstead's aid in negotiating the return of the nets as well as in the documenting of treaty rights. Senator Shipstead in turn asked the commissioner of Indian affairs to investigate the matter.[35]

The Indian Office sought information from Superintendent Allen. In reply, Allen acknowledged that many Chippewa had been fishing for white fish at Leech Lake with nets. Allen further observed, as he had done earlier, that state game wardens had tended towards leniency when Chippewa only fished "for their own use." He did not know how many nets had been seized in the present incident to which Jim Green Hill referred. Allen, moreover, noted that "some of the Indians believe, or profess to believe, that their right to hunt and fish in the ceded lands without regard to State law is guaranteed by various treaties made with the Government." But, as Allen explained further, they should have realized that this was not the case since the Chippewa under his jurisdiction

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and Aug. 18, 1926; Allen to French August 17, 1926; Allen to CIA, Aug. 21, 1926, all in 21115-1926-Consolidated Chippewa-115, CCF 1907-1939, BIA, RG 75, NA.

[35] Jim Green Hill to A. M. Lee, Secretary to Senator Henrik Shipstead, Aug. 12, 1929; Shipstead to CIA Charles Burke, Aug. 15, 1929, both in 40932-1929-Consolidated Chippewa-115, CCF 1907-1939, BIA, RG 75, NA.

had been advised "many times that no such treaty stipulations" guaranteed them hunting and fishing rights.[36]

In his subsequent explanation to Senator Shipstead, Assistant Commissioner of Indian Affairs J. Henry Scattergood verified that the use of nets to catch fish "on state territory in violation of the state game laws" had occurred in the vicinity of Leech Lake. Scattergood contended that, despite the state game wardens' practice of leniency when Indians fished for their own consumption, it was "very doubtful that anything can be done to prevent the state game authorities from confiscating nets when used for commercial fishing in violation of the state game laws, on territory under state jurisdiction." Scattergood knew of no treaty provisions under the terms of which "the Chippewa Indians of Minnesota have the right to hunt or fish on land ceded to the United States and sold or otherwise disposed of under the general land laws." Finally, Scattergood clarified the federal position regarding where state game laws did *not* apply: "State game regulations do not, however, apply to reservation Indians, though citizens, when taking game or fishing on tribal Indian land or on trust or restricted Indian allotments."[37] Again, the decision regarding state jurisdiction and the application of state game laws to Indians in Minnesota depended upon where an alleged offense occurred and upon an individual's status as an allottee.

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[36] Supt. E.A. Allen to CIA, Aug. 28, 1929, 40932-1929-Consolidated Chippewa-115, CCF 1907-1939, BIA, RG 75, NA.

[37] Asst. CIA J. Henry Scattergood to Senator Henrik Shipstead, Sept. 13, 1929, 40932-1929-Consolidated Chippewa-115, CCF 1907-1939, BIA, RG 75, NA.

4.1.1 Minnesota Forest Lands

Establishment of the Minnesota National Forest (later the Chippewa National Forest) in 1908 also complicated the applicability of state game laws to Minnesota Chippewa. Bruce White's analysis of this issue leaves the reader with the impression that state game and fish officials unilaterally formulated a policy adverse to claimed Chippewa treaty rights in this federal forest (White, pp. 107-109). Quite the opposite is true.

In January of 1924, a Chippewa from Cass Lake, George Jones, sought information about Indians' rights to hunt and fish on national forest lands. In reply, Assistant Commissioner Meritt explained to Jones that Indians in Minnesota were "required to observe the State game and fishing laws when hunting or trapping on national forest reservations, or on other lands outside their present reservation."[38] For his answer Meritt relied on a May 1, 1917 Interior Department solicitor's opinion. In that opinion, Interior Department Solicitor Charles D. Mahaffie examined the history of the Nelson Act of 1889 and the establishment of the Minnesota National Forest in 1908. The Minnesota National Forest embraced lands that originally comprised land reserved for Chippewa at Leech, Winnibigoshish, and Cass lakes. A query from the commissioner of Indian affairs concerning the rights of Chippewa to hunt within the boundaries of the national forest, "without being amenable to the fish and game

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[38] George Jones to CIA, Jan. 8, 1924; Asst. CIA E.B. Meritt to George Jones, Jan. 22, 1924, 2687-1924-Consolidated Chippewa-115, CCF 1907-1939, BIA, RG 75, NA.

laws of the State of Minnesota," had elicited the opinion.[39]

Mahaffie held that, on March 4, 1890, when the President approved the cession delineated by the Nelson Act, "the jurisdiction of the State of Minnesota attached to the lands later allotted to the individual Indians" who had decided not to move to the White Earth Indian Reservation. Consequently, allotments within the boundaries of the Minnesota National Forest were made on ceded land, jurisdiction over which had already passed to the state Mahaffie further found that the usual distinction between fee-patented and trust-patented allottees did not hold within the confines of the national forest. Relying on *Hallowell v. United States* (221 U.S. 317, at 324), Mahaffie argued that a state could have "jurisdiction over land embraced in a trust allottment," even though the federal government exercised guardianship over individual trust-patented allottees. Mahaffie concluded, therefore, that all of the land contained within the Minnesota National Forest, "whether allotted or unallotted," was subject to state laws.[40]

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[39] Charles D. Mahaffie, Solicitor, Dept. of the Interior, to E.C. Bradley, Asst. to the SOI, May 1, 1917, File: Hunting and Fishing 115, Box 62, Decimal Correspondence Files 105-124, Consolidated Chippewa Files, BIA, RG 75, NA-CPR.

[40] Ibid., pp. 5-6, 8. In his opinion, Mahaffie cited the following cases: *Ward v. Race Horse*, in support of the state's power to regulate fish and game notwithstanding the existence of prior treaties; *In re Blackbird*, in support of an Indian's right to hunt or fish for subsistence within reservation boundaries; and *Selkirk v. Stevens*, in support of the contention that hunting and fishing rights did not extend to the off-reservation sale of game or fish.

The Indian Office initially held a contrary view to the Interior solicitor only with respect to restricted allotments on the forest. It asked for a reconsideration. In 1919, Mahaffie again asserted that, because the state of Minnesota had jurisdiction over lands within the borders of the Minnesota National Forest, the state therefore had the power to regulate all hunting and fishing on those lands. Mahaffie observed that the purpose of the Nelson Act agreement with the Chippewa was to "secure the cession of the land and the extinguishment of the Indians' right and title." Prior to the cession agreement, Mahaffie understood the right to hunt and fish on reservations as a tribal right. He maintained that, because "the act of cession and the agreement contemplated removal of the Indians to another reservation," the Nelson Act "strongly points to the abandonment by the Indians of any tribal rights in ceded portion."[41] Assistant Commissioner Meritt's 1924 letter to George Jones evidences the Indian Office's acceptance of the Interior solicitor's final opinion.

4.1.2 Distinctiveness of Red Lake Indian Reservation

Bruce White claims that the State of Minnesota believed that the Red Lake Indian Reservation was the

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[41] Charles D. Mahaffie, Solicitor, Dept. of the Interior, to the SOI, Nov. 7, 1919, File: Hunting and Fishing 115, Box 62, Decimal Correspondence Files 105-124, Consolidated Chippewa Files, BIA, RG 75, NA-CPR, pp. 2-3. Mahaffie again cited *Ward v. Racehorse*, *In re Blackbird*, and *Selkirk v. Stevens*. He also cited and discussed *Kennedy v. Becker*. See also Asst. CIA E.B. Meritt to George Jones, Jan. 22, 1924, 2687-1924-Consolidated Chippewa-115, CCF 1907-1939, BIA, RG 75, NA.

only reservation in the state. Again he implies that state officials formulated this position unilaterally (pp. 58, 171-172). To the contrary, the distinctiveness of the Red Lake Reservation was shared by federal officials and was premised on federal policy and congressional action (see note 30).

The Indian Office's answer to a query from a Red Lake Chippewa, Scott King Bird, in 1927, regarding hunting and fishing rights, demonstrated the distinctiveness of Red Lake Indian Reservation. Because this reservation had never been allotted, the tribal right to hunt and fish had remained in force there. On November 15, 1927, Scott King Bird wrote to federal Indian officials, seeking from them a permit to hunt and fish anywhere in the state of Minnesota, but especially at Cass Lake where he and his family resided. The acting superintendent at the Consolidated Chippewa Agency informed the office that King Bird could hunt and fish within the boundaries of the Red Lake Indian Reservation "without regard for the State game and fish laws." But, while he stayed in the vicinity of Cass Lake, where only "a few restricted Indian allotments" remained, where he did not have an

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did examine specific and general Chippewa claims. Moreover, by the 1930s, their investigation had unearthed information regarding the executive order of February 6, 1850 that they believed had revoked temporary privileges granted to the Chippewa by Article 5 of the July 29, 1837 treaty and by Article 2 of the October 4, 1842 treaty.

Commissioner of Indian Affairs Charles Rhoads issued one of the first of these references to the 1850

executive order. In an October 15, 1930 letter to William Ackley of Lac du Flambeau, Wisconsin, Burke quoted from the 1850 executive order and explained that it "specifically revoked" the "hunting and fishing privileges granted in Articles 5 and 2 of the Treaties of 1837 and 1842."[64] In 1932, Rhoads again referenced the 1850 executive order in a response to Nay-tah-Wash, a Chippewa Living at the White Earth Indian Reservation who assumed Chippewa treaty "privileges and rights" held until the expiration of the treaty of 1869, or as he explained, until 1939.[65] In addition to mentioning the revocation of temporary privileges granted by the treaties of 1837 and 1842, Rhoads also restated the federal position regarding when state conservation laws applied to Indians:

> The Indians have, of course, the right to hunt or fish outside the limits of their reservation anywhere in the State where hunting or fishing are

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[64] CIA Charles J. Rhoads to William Ackley, October 15, 1930, Box 1095, File 5-1, Part 2, Chippewa Indians of Minnesota, Hunting and Fishing, CCF 1907-1936, Records of the Office of the Secretary of the Interior, RG 48, NA.

In a letter to Minnesota Representative William A. Pittenger, the commissioner again referred to the 1850 executive order's revocation of privileges granted by the treaties of 1837 and 1842. See CIA to Rep. Pittenger, Feb. 5, 1931, 59915-1929-Lac du Flambeau-115, CCF 1907-1939, BIA, RG 75, NA.

[65] Nay-tah-Wash to CIA, Nov. 13, 1931, CIA Charles J. Rhoads to Nay-tah-Wash, Jan. 26, 1932, 50849-1930-Consolidated Chippewa-115, CCF 1907-1939, BIA, RG 75, NA. In Rhoads' reply he noted that Nay-tah-Wash meant the Treaty of March 19, 1867.

> not prohibited, providing they comply with the State game laws as to license, season, etc.[66]

United States Attorney Stanley Ryan, serving the Western District or Wisconsin, referenced the 1850 executive order in a letter to Hayward Indian School Superintendent James P. Ryder in 1932. The superintendent wanted to test whether Indians had the right to hunt and fish without regard to state laws on ceded territory by appealing the case of two Chippewa under his jurisdiction who had been arrested for trapping off the reservation. Ryan advised against the appeal, noting that the treaty of 1837, by the phrase "during the pleasure of the president of the United States," had "authorized" the revocation. Despite Ryder's speculation that President Zachary Taylor may have exceeded his authority by issuing the order, the Indian Office advised Ryder to "abide by the decision of the United States Attorney in the matter."[67]

Officials at the highest level of the Department of the Interior also referenced the 1850 executive order. In October of 1932, Acting Secretary of the Interior John H. Edwards stated that the order revoked the privileges

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[66] CIA Charles J. Rhoads to Nay-tah-Wash, Jan. 26, 1932, 50849-1930-Consolidated Chippewa-115, CCF 1907-1939, BIA, RG 75, NA.

[67] Stanley M. Ryan, U.S. Attorney, Western District of Wisconsin, to James P. Ryder, Supt., Hayward Indian School, Feb. 25, 1932; Supt. Ryder to CIA, March 3, 1932; Acting CIA to James P. Ryder, March 18, 1932, all in *State of Wisconsin v. Geo. James & James Bennett*, Fur Trapping, 1932, Box 7, Decimal Correspondence Files, 1920-1930s, Records of the Hayward Indian School, BIA, RG 75, NA-GLRB.

granted by the Treaty of October 4, 1842. Charles Ackley of Odanah, Wisconsin had requested information from President Franklin Roosevelt regarding the hunting, fishing and trapping rights of the Lake Superior Chippewa. Replying for the President, Edwards quoted from the February 6, 1850 order and further clarified that Article 11 of the Treaty of September 30, 1854 only granted hunting and fishing rights on ceded lands within a certain portion of Minnesota (see Map 1).[68]

Some five years later, Assistant Interior Secretary Oscar L. Chapman cited the 1850 executive order in a January 26, 1938 letter to the Attorney General. The case of George Cardinal from the L'Anse Indian Reservation in Michigan prompted Chapman's letter. Cardinal had been charged for fishing in violation of state game laws. In addition to navigability issues, Chapman considered the question of the "continued right of the Indians to hunt and fish in the areas ceded by them in derogation of the State game laws." This led the assistant secretary to an examination of the treaties of 1837, 1842 and 1854, which, as Chapman noted, contained provisions stipulating that the President could revoke the privileges granted therein. After quoting the 1850 executive order, Chapman interpreted it to mean that the Chippewa had "no greater right to hunt or fish" on lands ceded by the 1837 and 1842 treaties than did any other citizen of the state. According to Chapman, the Chippewa were therefore "amenable to

[68] Acting SOI John H. Edwards to Charles Ackley, Odanah, Wisconsin, Oct. 17, 1932, File 5-1, Part 2, Great Lakes, Hunting and Fishing, CCF 1907-1936, Records of the Office of the Secretary of the Interior, RG 48, NA.

the game laws of the state while hunting or fishing within the areas ceded by those treaties." He advised against an appeal of Cardinal's case because, given the effect of the 1850 executive order, it would be "useless, or futile, other than to satisfy the Indians whose rights are involved as to the merits of the controversy."[69]

Chapman attributed "[m]uch of the confusion" generated by queries regarding Chippewa claims to hunting and fishing rights to the fact that "apparently the President's order of February 6, 1850" had been "overlooked."[70] This was no longer the case by the mid-1930s.

Even President Franklin Roosevelt in a March 1, 1938 letter to Gus Whitebird of the Bad River Indian Reservation in Wisconsin referred to the 1850 executive order. Roosevelt noted that the Chippewa had "enjoyed" the "special hunting and fishing privileges" granted by the treaties of 1837 and 1842 until President Taylor issued the February 6, 1850 order that revoked them. Like Chapman, Roosevelt interpreted this to mean that the Chippewa had

[69] Asst. SOI Oscar L. Chapman to the Attorney General, Jan. 26, 1938, 20940-Great Lakes-931, CCF 1907-1939. BIA, RG 75, NA. Chapman further believed that, because no such order had ever revoked the privileges granted by the 1854 treaty, "a considerable question remains as to the continued right of the Indians to hunt and fish in the area ceded by that treaty," without regard for state game laws. Chapman thought that the U.S. Supreme Court decision in *U.S. v. Winans* should be liberally applied in favor of the retention of hunting and fishing privileges as granted by the 1854 treaty.

[70] Ibid.

no "greater right to hunt or fish on the ceded area" than did other state citizens.[71]

Contradicting Bruce White's apparent view that conservation needs were not a basis for federal or state policy with respect to the Chippewa, Roosevelt confirmed the conservation impetus that underlay federal policy. The president sympathized with Indians who might "find it difficult to adjust themselves to meet conditions which must be imposed to conserve the wildlife resources of our country." Roosevelt suggested, however, that unregulated hunting and fishing throughout the nation had motivated states to control these practices in order to protect and conserve resources. Echoing the statements of many federal Indian officials, Roosevelt hoped that American Indians would "take the initiative in the conservation of such resources on restricted Indian lands within their reservations."[72]

In July, 1938, in response to the arrest of another Chippewa who resided at Bad River Indian Reservation, F.H. Daiker, an assistant to Commissioner Collier, also referenced the 1850 executive order. In addition to noting that the order revoked the "special prvileges" granted by the October 4, 1842 treaty, Daiker reviewed the effect of the September 30, 1854 treaty. Article 11 of that treaty, according to Daiker, referred "only to lands ceded" by the treaty of 1854, and did not "renew or recreate any rights"

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[71] President Franklin D. Roosevelt to Gus Whitebird, Bad River Indian Reservation, Odanah, Wisconsin, March 1, 1938, 53121-1930-Lac du Flambeau-115, CCF 1907-1939, BIA, RG 75, NA.

[72] Ibid.

that the Chippewa "might have had prior to their cession in the above-mentioned Treaty of 1842."[73]

One year later, Assistant Commissioner of Indian Affairs William Zimmerman, Jr., explained the effect of the 1850 executive order to Minnesota Representative Harold Knutson. A request for information from Knutson concerning the claims of a group of Chippewa residing at Vineland prompted the discussion. After stating that the 1850 executive order had "specifically revoked" the privileges granted by the 1837 treaty, Zimmerman further explained that the treaties of 1855 and 1864 creating and then ceding a portion of the Mille Lacs Indian Reservation reserved "[n]o special hunting privileges on ceded lands." Zimmerman concluded by reciting the now well-established criteria for determining the applicability of state game laws on Indian lands.[74]

As late as 1945, federal Indian officials referenced the 1850 executive order. In answer to questions raised by a Chippewa of the Lac Courte Oreille Indian Reservation concerning the Chippewa "treaty right to hunt, fish, and trap on lands adjacent to their reservations without a [state] license," Zimmerman again counseled that the 1850 executive order had revoked the privileges granted

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[73] F. H. Daiker, Asst. to the CIA, to J.C. Cavill, Supt., Great Lakes Agency, July 29, 1938, approval of the Assistant Secretary of the Interior indicated on August 1, 1938, 43931-1938-Great Lakes-931, CCF 1907-1939, BIA, RG 75, NA.

[74] Representative Harold Knutson to CIA John Collier, June 24, 1939; William Zimmerman, Jr., to Representative Harold Knutson, July 8, 1939, both in 41544-1939-Consolidated Chippewa-931, CCF 1907-1939, BIA, RG 75, NA.

by the 1837 treaty. Like Assistant Interior Secretary Chapman and President Roosevelt before him, Zimmerman interpreted the revocation to mean that Chippewa, in this case members of the Lake Superior Band, had only the right to hunt and fish on ceded lands "in common with other citizens of the state" as regulated by state conservation laws.[75]

Thus, in answer to the several inquiries from Chippewa regarding claims to treaty rights to hunt and fish on ceded lands irrespective of state law, federal officials consistently responded by characterizing these rights as inherent only to reservation and trust lands. The sole exception to this response was with respect to Article 11 of the Chippewa treaty of 1854 that referenced lands in northeastern Minnesota (see Map 1). Even after the Collier administration reformulated much of federal Indian policy in order to emphasize tribal reorganization and renewal, the answer to these queries remained the same: When hunting and fishing on lands that were no longer tribally owned or held in trust by the federal government, Indians had to observe state game laws.

II. Commercial Fishing In Lake Mille Lacs

Bruce White discusses at great length the establishment, history, and controversy of Minnesota's commercial fishery that allowed, among other things, for Chippewa net fishing at Mille Lacs Lake in 1918. White's treatment

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[75] Asst. CIA William *Zimmerman*, Jr., to Representative Alvin E. O'Konski (Wisconsin), Aug. 23, 1945, 29040-1936-Great Lakes-931, CCF 1907-1939, BIA, RG 75, NA.

of the state fishery at Mille Lacs Lake misses the significance of three critical points. Those points are:

> 1) The fishery was established, and the rules for its operation were enacted and enforced, by state game officials, under state authority;
>
> 2) At no time in the various discussions about Chippewa participation in the fishery was there any suggestion that Chippewa fishing in the lake was based on claims to any treaty rights;
>
> * * *

Portions Of Dr. Roderick H. Squires's Phase II Expert Report, Adopted And Filed As Testimony

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

* * *

Rainbow Island, occupying 3.25 acres in section 26 of Township 43 North, Range 27 West noted by Oscar Garrison in his subdivisional survey of 1865. Spirit Island, occupying 0.27 acres in section 5 of Township 42 North, Range 26 West, and now part of the Mille Lacs National Wildlife Refuge, was not platted until 1917. On this plat is a note "not shown upon the plat approved December 23, 1870" (Appendix R).

The issue regarding the water boundary is not trivial. The band cannot successfully claim that the reservation extends over the lake then they presumably possess reserved water rights to the lake surface.

Conclusion

The history of particular reservations, like the history of particular American-Indian tribes, is unique. While treaties, such as the one signed in 1855, established several reservations simultaneously the subsequent histories of each reservations may be very dissimilar (Appendix W). The Mille Lacs Reservation was, like all reservations, unique in its history. Part of its distinctiveness arises from the fact that, although the reservation itself was ceded in 1863 and 1864, the band continued to occupy the lands with the tacit acceptance of the federal government – yet

another example of the complex and often contradictory federal Indian policy.

The federal government was seeking to consolidate the Mississippi Chippewa bands in one reservations, firstly around Leech Lake (1863, 1864) and then at White Earth (1867). Although the bands ceded the reservations that had been established in 1855, thus they became disestablished, the federal government appeared to see no urgency in moving them from the areas they resided to the new reservations. In fact, the Mille Lac Band was expressly allowed to occupy and use the land that they had ceded – there was no reservation but the government granted them usufructurary rights within the former reservation boundaries – on condition they did not interfere with the non-Indians. Congress intended to disestablish the Mille Lac Reservation, along with the other reservations established in 1855, in 1863 and 1864, and again in 1867.

Even if the reservation continued to exist, as the Court of Claims erroneously found, the Band was compensated for the land that was illegally alienated both before and after it was opened to non-Indian settlement under the Nelson Act.

Supplement to **"Historical Geography of the Mille Lacs Reservation"**

On page 31, paragraph 2 should read.

"The issue regarding the water boundary is not trivial. In my opinion the band cannot claim that the reservation extends over the lake and thus they do not possess reserved water rights to the lake surface".

/s/ Rod Squires
Jan. 29 1996

* * *

on Indian matters.

Each branch of the federal government has a role to play in making policy. The Congress, the President and other parts of the executive branch, and the courts policy with the assent, and usually help, of the other branches. The United States is, in fact, a divided democracy, the origins of which have been endlessly debated (Thurber, 1991, Appendix B). At any one point in time, however, one branch may have more of an influence on policy than the other branches depending on its political strength. Throughout the nineteenth century the principles and programs that defined Indian policy and public land policy were dominated by executive action.

Federal policy in one arena cannot be divorced from policy in another arena. The national goals, programs, and judicial opinions that define various policy arenas are related. There are two main consequences of this relationship; firstly, policy in one arena is partly explicable with reference to the goals, programs, and judicial opinions in another policy arena; and secondly, changes

in one policy arena may well initiate or require changes in the goals, programs, and judicial opinions in other policy.

> We have so long been accustomed to think of Indian policy in the early national period in terms of ruthless aggression and limitless avarice for Indian lands that it will stretch our mental forms to see that Indian policy did not stand by itself outside the(se) general trends of American thought and sentiment – but was indeed strongly affected by them and in some ways an integral part of them (Prucha, 1981 22).

In this paper I examine the role of the executive branch of the federal government in two related federal policies of the nineteenth century, the federal Indian policy and the federal land alienation policy. Federal Indian policies of the nineteenth century articulated several national goals, of isolating Indians from non-Indians, of separating the two peoples, and of assimilating Indians into the non-Indian society, through treaties in which American Indian tribes ceded land and the federal government established reservations. Federal land alienation policies during the same period also articulated twin national goals, extinguishing Indian occupancy and use rights to land, including hunting, fishing, and gathering privelege [sic] and uses, and promoting the settlement of the interior portion of the country.

Today, federal Indian policy comprises the statutes, rules, and judicial opinions that define the relationship between the federal government and American-Indian tribes. Current policy can only be fully explained with reference to past policies, however, from the preceding statutes, rules,

and judicial opinions created during the past two centuries of debate, often acrimonious, between the federal government and the various American-Indian groups. From the earliest days of the republic the federal government has possessed plenary power to govern the affairs of American Indian tribes and the Constitutional authority to control the disposition of the public lands. During the first part of the nineteenth century the principles and practices that dominated Indian policies were aimed at keeping the peace between the Indians and non-Indians, controlling the Indian's commercial links with European Americans, and curbing non-Indian settlement in area over which Indians possessed extensive occupancy and use rights. Such policies gave way to different policies aimed at creating units of American-Indian governments, making treaties and agreements with these jurisdictions, extinguishing their occupancy and use rights, and reserving portions of the public land for a homeland. These policies, in turn, gave way to policies for assimilating American-Indians into the non-Indian society and for removing Indian title on many of the reservations. Individual treaties, made at a particular time, reflect such overall

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> The policy of the federal government toward the American Indians cannot be understood as something isolated from the main course of United States history. It will not do – as many of our textbook writers assume – to treat the relations between the whites and Indians as events that can be inserted into traditional accounts of the nation's development like foreign bits stuck in here and there o [sic] satisfy current demands

> for attention to ethnic minorities. Nor can we turn, at the other extreme, to the monograph writers, the specialists on Indian policy, who are likely to place their subject quite outside the general context of the cultural patterns of the times about which they write (Prucha, 1981 20).

> For more than a century, Supreme Court Justices, Attorneys General, and Commissioners of Indian Affairs have commented on the intricate complexity and peculiarity of Indian law. . . . The federal law governing Indians is a mass of statutes, treaties, and judicial and administrative rulings, that includes practically all the fields of law known to textbook writers – the law of real property, contracts, corporations, torts, domestic relations, procedure, criminal law, federal jurisdiction, constitutional law, conflicts of law, and international law. And in each of these fields the fact that Indians are involved gives the basic doctrines and concepts of the fields a new quirk which sometimes carries unpredictable consequences (Cohen, 1972 xxii).

The Power of the President

The relationship between the president and the Congress has been under discussion as long as the US Constitution has existed. It has been a discussion in which presidents, congressional leaders, Supreme Court justices, scholars from many disciplines, political pundits of all stripes, and ordinary citizens of every sort have participated. For many of the participants, the point of the discussion has been to understand who governs or who should govern, the president or the Congress, and what techniques and resources

> each of these institutions has at its disposal to work its will upon the other (Mezey, 1989 xiii).

Mezey argued that the current relationship between the president and the Congress has adversely affected the capacity of the political system to produce good policy stating,

> (O)ur inability to produce good public policy is rooted in our constitutional arrangement of separate political institutions sharing power and in our political culture, which is inclined to view government more in a malevolent than in benevolent terms (Mezey, 1989 xii).

Today, the presidency and the Congress are very different than when the two institutions were defined over two centuries ago. But, although the individuals who created the Constitution could not have known the magnitude of the economic, social, political, and geographic changes that would take place, they knew change would take place and the Constitution was worded accordingly. "It is clear that the Founders decided that theirs would be a "living Constitution" one whose terms could be interpreted and altered to meet the real task of governing" (Mezey, 1989 47).

The executive power in the United States is vested in a president. Although such power is not defined very precisely in the federal Constitution, unlike the enumerated powers given to the Congress in Article I Section 8. He possesses a most important authority, to veto any bill passed by both chambers of Congress. Thus the president has the power to express ultimate disagreement with how a majority of the elected members of the legislative branch exercises its Constitutional authority. Most of the

executive power was clearly intended to be subject to some sort of legislative control and thus several statements in the Constitution appear designed to invite disagreement between the legislative and executive bodies, part of the checks and balances. The president is commander-in-chief of the nation's army and navy, and the states' militia when pressed in the nation's service. However, the Congress is empowered to declare war, to raise and support armies, to provide and maintain a navy, and to govern the militia in the service of the United States. The president has the authority to make treaties, however those treaties would only become the law of the land, "with the advice and consent of the senate, provided two-thirds of the senators present concur". Finally, the president possesses the power to appoint ambassadors, consuls, judges of the supreme court, "other public ministers", and "all other offices of the United States whose appointments" not provided for in the Constitution. However, such appointments were to be made "with the advice and consent of the Senate". Paradoxically perhaps, the Constitution gives the Congress authority to "vest the appointment of such inferior offices as they think proper in the president alone, in the courts of law, or in the heads of departments".

Perhaps the most important limitation on presidential authority is the power of the purse possessed by Congress. The Constitution says, "(n)o money shall be drawn from the treasury but in consequence of appropriations made by law". Thus the president in exercising his authority, is impacted by the fiscal policy that involves protracted congressional deliberations.

The Constitutional limits on the powers of the president and the Congress provide the checks and balances that our founders regarded as necessary in creating policy for governing the nation. In some instances the Congress makes legislative proposals which the president rejects, in some instances the president makes executive decisions, often through agencies under his direction, for which the legislature does not appropriate any money. The process of governing our divided democracy sometimes reflects, quite strongly, the hand of the president and sometimes the hand of the legislature.

Scholars have discussed some of the changes involving political power, especially executive power, during the nineteenth century. (Appendix C). Mezey (1989) has described these changes.

> (T)he most significant modifications in our policy-making roles of the Congress and the presidency and in the relationship between the two institutions occurred, not through the formal process of constitutional amendments, but through a more informal process typically set in motion by circumstances in which the words of the Constitution proved inadequate to the governmental problems in hand. In such instances, presidents usually asserted power and Congress, often after some initial resistance, ultimately acquiesced. Only rarely did the Congress or, when called upon, the Supreme Court reject such presidentially initiated redefinition's of executive power. In fact, during the twentieth century, Congress took the lead by conferring new powers on the president. And once a new power was exercised by president, the only thing that his successors needed to do when

> they wanted to exercise the power was to cite the earlier action as a justifying precedent. In any case, the result, whether through new laws, judicial decisions, or a president's precedent-setting action, was an expanded understanding of executive power.

Nonetheless, it would be a gross but not uncommon oversimplification to reduce the history of US political institutions to presidential ascendancy and congressional decline. In fact, as the prominence of the national government increased, both the president and the Congress became more powerful. What did happen, however, was that the cumulative impact of all that took place from 1787 on was to transform the presidency into an institution radically different from the one described in the Constitution (Mezey, 1989 47-48).

Federal Land Alienation Policy

In the usual broad language of the Constitution Congress was given the power "to dispose and make all needful rules and regulations respecting the territory and other property belonging to the United States" (Article IV, section 3). The Constitution also gave Congress more limited power to retain or acquire title to land for various government purposes and to exercise jurisdiction over an area that would become the seat of the government of the United States. In addition Congress, was

> to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings (Article I, Section 8).

Under these provisions, Congress has enacted, with the concurrence of the president, a multitude of statutes conveying, reserving, and even acquiring tracts of land. From the first days of the nation Congress conveyed title to that part of the United States lying outside the boundaries of the original states and those lands that were acquired during the nineteenth and twentieth centuries from various foreign governments. Thousands of public land laws were enacted that described, on one hand, what lands the federal government wished to convey and how millions of individuals, railroad and canal corporations, and all of the states created out of the public lands could acquire title. This process, noted by some scholars as the most important single factor in American history, quite naturally gave character to various federal policies relating to land ownership and land use, such as agriculture, forestry, minerals, and urbanization. The federal policies regarding land ownership and land use have also gave [sic] character to federal-state relationships and federal Indian policy.

The land alienation process was not dominated by Congress. It was essentially an administrative process controlled and dominated by the President and the executive branch. An executive agency, the General Land Office operating under Congressional authority and funding, described and conveyed title to parcels of land. The process has been described eloquently by historians, such as Gates (1968), Dick (1971), and Rohrbough (1990).

> In the spring of 1789 a new government took office under the new Constitution. The task of making a suitable policy for the distribution of the public domain in the West now merged with

> the greater problem of creating an administrative mechanism for the national government. The latter was a monumentous task and was made more difficult and precarious by the narrow margin of approval for the new form of government and by the heavy obligation it assumed. So the public lands and their administration had to find a place in a new system. The largest and most important branch of the new government, the Treasury, was closely connected with the pressing issue of the period: the nation's debt. Its ambitious chief was Alexander Hamilton. The Congressional organic act establishing the Treasury Department provided, among other duties, that the department should execute such measures for the sale of the public lands as should be given it by law. In August 1790, Congress gave the department responsibility for the survey of the seven ranges. Once again the public domain would function as an aspect of the nation's revenue. The sale and administration of the public domain had to be integrated with the nation's financial program. Congress appealed to the new Secretary of the Treasury for suitable recommendations (Rohrbough, 1990 12).

After 1796 Congress gave the responsibility for creating what would eventually become a national system of rectangular real property boundaries to various surveyors general, appointed by the President, and a cadre of deputy surveyors. Operating independently, in 1836 these individuals were placed under the control of the General Land Office. It was this office, in effect the federal real estate agency, that was responsible for conveying title to land under the various land laws enacted by Congress.

Established in 1812 the agency was headed by a Commissioner appointed by the President and operated through the basic administrative unit, the land district, and the land district office staffed by a register and receiver, appointed by the President. The lands were prepared for market (surveyed and advertised), sold, and patents issued by the land officers who also made rulings in the case of disputes between individuals. These land officers sent reports to Commissioner in Washington who, in turn, communicated the information to the Secretary of the Treasury or the Secretary of the Interior. On the basis of all these reports and rulings Congress enacted land statutes and appropriated funds for the continued operation of the General Land Office. Attached as Appendix D are two chapters from Malcolm Rohrbough's book, *The Land Office Business* (1990), describing the land alienation process during the 1830's.

The President exerted enormous control over the land alienation process through the powers that Congress delegated to him to carry out the land alienation policy that was made by the executive and legislative branches. He appointed many of the officials in Washington and in the various land offices. Thus, the decisions made by these individuals, many of which were quasi-judicial in nature, represented his decisions. He proclaimed what land would be sold at a particular time at a particular place, he described the order in which lands would be offered at the public auction, he even withdrew lands that he had said would be sold. In addition he controlled the basic geography of the land alienation process. He was given the power to move the land office from one city to another and to change the boundaries of a land district.

The President ensured that policy, described in statutes and executive messages and orders, was effected. In chapter 13 of his book Rohrbough described the land alienation process and the influence of President Andrew Jackson (Appendix E). He also eloquently summed up the disposal process during the period 1789-1837 (Appendix F).

In the language of several thousand public land statutes, reflecting very disparate goals, Congress authorized the General Land Office to convey federal title to the public domain. The principle [sic] objective of the federal government was to encourage European American migration into the interior of the continent by using land not only to subsidize settlement by individuals but also to subsidize the construction of a transportation net and the development of territories and states. Consequently, throughout the nineteenth century the emphasis was on the disposal of lands. Any reservations of land, or rather withdrawal of lands from the public domain, were designed to keep certain lands out of the hands of private owners. For the most part they were intended to be temporary. Such withdrawals included land intended for various federal purposes including those for military. They also included reservations of land that were intended to be conveyed to the state when those units of government became entitled to possess title. As Dana *et al* (1960 112) noted, that changed in the last decade of the century.

> Creation of Yellowstone National Park in 1872 marked the first step in the evolution of national policy from that of virtually complete disposal

> of the public domain to that of virtually complete reservation. . . . The evolution from disposal to reservation culminated in 1935, when President Roosevelt withdrew from entry, pending classification, practically all of the remaining unreserved and unappropriated public domain.

In 1891 Congress authorized the president to withdraw part of the public domain from public sale and establish forest reserves to protect the timber supplies of the nation (26 Stat. 1095). Congressional acquiescence of the necessity of retaining some public domain land in federal ownership was largely the outcome of the national concerns regarding the land alienation policies during the century, concerns articulated by the Public Land Commission established in 1879 to review such government policies (Petulla, 1977 217ff). This legislation initiated the idea that some of the land that was still owned by the federal government should not be conveyed. Subsequently, the Congress enacted legislation that has set aside a large acreage of federal lands for a variety of purposes, such as national parks, national forests, and national wildlife refuges.

To complete the land alienation policy "circle" starting in 1911, under the power to regulate commerce among states Congress authorized the Secretary of the Agriculture to acquire cutover forestlands in the eastern part of the United States. Thus, during the present century the federal government has been acquiring title to lands either that it had never owned or that it had conveyed over the previous century. Federal lands today comprise those that never left the public domain, lands have always been owned by the federal government, lands that

were part of the public domain at one time but conveyed to private individuals, corporations, or states, and lands that were never part of the public domain, the land surface of the original thirteen states or Texas, for example. There are a variety of jurisdictional questions associated with these lands.

In sum, federal public land policies have developed under a tremendous volume of statutes, executive orders and rules, and judicial opinions, polices that have conveyed, reserved and, most recently, acquired title, policies that have given rise to the suite of federal land management units, installations and buildings that fulfill of a variety of federal government objectives throughout the United States.

The role of the President in withdrawing lands from the public domain, in essence reserving such lands, has been examined in detail by Wheatley (1969, Appendix G). Kappler (1913) described the authority of the executive branch in setting aside reservations. He wrote,

> (T)he authority of the President can not be interpreted to be anything more than an assumed or delegated power which by long and uninterrupted usage has never been denied either legislatively or judicially, but on the contrary has been legislatively and judicially recognized.
>
> The theory of the courts in passing upon this questions [sic] appears to have been that the President in the exercise of his executive powers stands in a position to protect and administer the public domain until Congress can act. It has proceeded to such an extent that it constitutes in fact, a part of the land laws of the United States, exists *ex necessitate rei*, as *indispensable to the*

> *public welfare*, and, viewed in that light by different laws of the Congress and decisions of the courts, has been regarded and referred to as an existing, undisputed, and well-settled power of the Executive (Kappler, 1913 693, Appendix H).
>
> Having the power to set aside the public lands for purposes indicated, the Executive possesses the same power to withdraw, modify, revoke, or extend, by proclamation or Executive order, unless prohibited by statute, reservations similarly created by him. (Kappler, 1913 695).

Kappler was particularly concerned with the power of the President to establish Indian reservations, a distinct category of reservation throughout the nineteenth century, withdrawals of land from the public domain made under the direct authority of the president (Appendix H). In numerous treaties and agreements lands were set aside for Indian groups in return for land cession.

> The regulation of the relations of the Government with Indian tribes is a great public interest, and their settlement upon reservations has been considered a matter of great importance. A reservation from the public lands, therefore, for Indian occupation may well be regarded as a public use (17 A.G. Ops. 259, quoted in Kappler, 1913 695).

These forms of reservation, in some instances (i.e. under one policy) designed to be temporary in other instances designed to be permanent, are clearly different from other public reservations since the users of such lands were not members of the general public but rather separate legal entities.

* * *

sometimes without. These treaties were proclaimed as law by the president and printed in the various volumes of the Statutes at Large, the *prima facie* evidence for statutory law.

Congress appeared to take little interest in ensuring that the treaty provisions were fulfilled except through the annual appropriations to the Indian Office or the Office of Indian Affairs, which were made, partly at least, in response to an annual report from the Commissioner of Indian Affairs. In fact, in 1851 Congress declared that "hereafter all Indian treaties shall be negotiated by such officers and agents of the Indian department as the President of the United States may designate for that purpose" (quoted in Prucha, 1994 210). Instead, an executive agency headed by a presidential appointee and a cadre of agents became responsible for carrying out policy, providing the annuities and removing the Indians from the ceded lands (Prucha, 1994 209).

> The relations of the United States with the Indians generally have been through designated administrative agencies, and it is therefore important to examine the structure, guiding policy, and manner of functioning of these agencies (Cohen, 1972 9).

How and why treaties were made, what compensation the Indian tribes were given, and how both the federal government and the Indian tribes fulfilled their obligations under the terms of the treaties, varied considerably from time to time and place to place. The meaning of each word and phrase in a particular treaty can be examined, as can the motives and the morality that underlay those

words and phrases, and the motives and the morality of subsequent actions by the executive agency given responsibility for Indian affairs.

To do so, without context, is to invite difficulty. The context of a particular treaty is given by the way in which the executive branch of government acted and the place of the treaty in the affairs of the nation, merely one part of domestic policy that was geared to extinguishing Indian title to land and to incorporating a non-European aboriginal population into the American society. As Prucha wrote,

> United States policy towards the Indian cannot be treated in a vacuum, set apart by the historian (consciously or unconsciously) from the main current of American thought. Prominent ideas of the age had significant influence – or at least, to state the proposition negatively, Indian policy did not go counter to prevailing sentiments and attitudes (Prucha, 1981 180).

He argued,

> A thorough study of Indian policy, in the light of the intellectual currents it reflected, may in the long run help us to test the completeness and accuracy of accepted analyses of the American mind, for intellectual historians sometimes jump to unwarranted conclusions about the effect on practice of the ideas they discover in the writings of a period (Prucha, 1981 180-181).

At any one time a treaty reflected the principles and practices that comprised Indian policy, a policy that was clearly tied to the migration and settlement of non-Indians and the spread of governments throughout the

United States. A treaty reflected the prevailing views of both Congress and the President although, since the President initiated the treaty-making process by appointing the commissioners, signed the treaty into law following its acceptance by the Senate, and was responsible for overseeing the agency that fulfilled the federal government's obligations under the terms of the treaty, he was the dominant actor in determining such policy. In fact, many of the treaties gave the president considerable power,

> He was authorized to establish trading posts; military posts or garrisons on Indian lands; to designate places for trade; to appoint agents; to arbitrate the claims of whites against Indians and Indians against whites; to arbitrate territorial and other difficulties between tribes; to prescribe the time of the removal and settlement of Indians; to determine whether grants of land to certain Indians shall be conveyed; to dispose of certain reserved lands as he sees fit; to give reservations to the headmen of a tribe, or cattle, or agricultural aid; to extend to an Indian tribe "from time to time, such benefits and acts of kindness as may be convenient, and seem just and proper" to him; to decrease the amount of annuities in proportion to any annual decrease of the Poncas, and stop the payment of annuities in the event that satisfactory efforts to advance and improve their condition were not made; to approve attorneys chosen by the chiefs and headmen; to invest tribal money in stocks; to make payments to relations and friends of the Indians; and to receive complaints of injuries done by individuals to the Indians and use such

> prudent means "as shall be necessary to preserve the said peace and friendship" with an Indian tribe (Cohen, 1971 42 citations omitted, Appendix I)

One of the powers that eventually devolved to the chief executive was the specific power to create Indian reservations, to alter their boundaries, and to survey the lands, often in preparation for allotting titles to the land to individual Indians. After 1854, treaties between the federal government and Indian bands in which the Indians ceded land often reserved part of the ceded area as part of the compensation for land cessions, a practice that became a cornerstone of federal Indian policy. Cohen (1972) described the process of establishing such reservations (Appendix L). This power, part of the power he possessed to reserve parts of the public domain for public purposes, has been summarized by Kappler (1913) as already quoted (Appendix H).

This presidential power, of creating reservations, was at issue in *Sioux Tribe of Indians vs. United* [sic] (316 US 317, Appendix J). Under some of the treaties he could suspend the operation of various parts of treaties. On February 16, 1911 President Taft, for example, limited the geographical effect of Article 5 of the treaty of July 23, 1851 (10 Stat. 949), Article 7 of the treaty of September 30 1854 (10 Stat. 1109), and Article 7 of the treaty of October 2, 1863 (13 Stat. 667). Inevitably the President and the Congress possessed different ideas about the role of government in general. Not surprisingly, the legislative and executive bodies should have different ideas about the place of individual American Indians and American Indian tribes in American society as well. They represented different

constituencies and interpreted their powers under the Constitution quite differently. Rarely was there complete unanimity between the various constituencies that lobbied Congress, the president, or the commissioners or agents during these periods. Official and unofficial published and unpublished reports and letters, many buried in the National Archives, portray the differences of opinions that existed. Presidential thought, motives, morality, and action and the actions of those he appointed either as commissioners to the treaty negotiations or as commissioners and agents responsible for Indian affairs dominated the treaty-making process (Appendix I). The President exercised his powers to make treaties frequently, the frequency and the manner depending on the whole range of policy issues with which he was faced. The executive order was a preferred tool.

> The executive order was a convenient instrument to use. An order could be easily changed and a new one substituted as occasion demanded; many Indian boundaries were frequently changed, and some seemed to be continually in flux. . . . At length, after the great use of orders reaching back to pre-Civil War days, Congress prohibited further executive orders for establishing or changing Indian reservations (Prucha, 1994 331-332).

With the luxury of hindsight we can divide past federal Indian policy into several distinct periods on the bases of the principles and practices described in treaties, principles and practices that defined federal Indian policy. These periods are clearly differentiated from each other and, as Prucha noticed, "It is not without significance that

major changes in Indian policy have always been proposed under the rubric of "reform," "and advances with a moral fervor of frightening intensity" * * * seem to contradict those that defined the previous policy. A constant theme through the nineteenth century treaties, however, was the isolation of the Indians from the whites, at first by removing Indian tribes west of the Mississippi, and then by creating Indian homelands within the boundaries of particular states and territories. The change in attitude, from complete removal from the non-Indian settled area to reservations within non-Indian settled areas, can be partly attributed to the realization that to remove Indian tribes from those areas in which non-Indians could be expected to settle was virtually impossible. White settlement and government spread far more rapidly than was expected, a spread fueled by immigrants to the United States who were drawn westwards by the prospect of landownership under the land alienation policy of the federal government. The change in attitude can also be attributed to the increasing attempts to "civilize" the American Indians, to make them agriculturists like white folk, a practice best achieved through contact with white agricultural settlers who would eventually surround, and perhaps even absorb, the Indian reservation.

In Minnesota the earliest cessions of land envisaged eventual removal of the Chippewa west of the Mississippi. Only one cession, that of 1837, occurred under this philosophy, however. In 1851, when the Sioux ceded all of their lands west of the Mississippi, reservations were established in Minnesota Territory. Reservations were subsequently established for Chippewa bands in both the treaties of 1854 and 1855.

In 1862 hostilities broke out between the Sioux and the white settlers in the Minnesota River valley where the Sioux reservations were located. At least one group of Chippewa led by Hole-in-the-day was ready to begin hostilities and asked other groups to join him. Other Chippewa bands, most notably perhaps the Mille Lac band, would not participate in the uprising. Such a disturbance by the Indians * * *

Public Lands

The ruling that the Mille Lac Band can only exercise the privilege given them in the 1837 treaty on the public lands in the ceded area makes little historical sense because it assumes that all public lands have the same legal status. The state of Minnesota holds title to the land surface in a variety [sic] ways, however, under its proprietary and sovereign capacities. Before the Band is allowed to exercise the privileges state title must be examined. Some, the trust fund lands, it holds in trust for all of the citizens of the state. To allow these lands to be used by a specifically described subset of its citizens, the Mille Lac Band, would violate this trust and would abrogate the state's fiduciary responsibilities to all Minnesotans since firstly, it would give band members privileges that the general populace does not possess and secondly, it would alter the physical and biological characteristics and reduce the economical value of the land to the state. Similarly, the state holds trust fund lands for the University of Minnesota. To allow Band members to exercise the privilege over such lands would reduce the value of the lands that could be used to support higher education. Some of the lands are owned by the state in trust for the

taxing districts although managed by the individual counties. To allow member [sic] of the Mille Lac Band to hunt, fish, and father without state regulation would again violate that trust – the revenue that counties would derive from the natural resources would be diminished. Finally, the state has acquired title to land through condemnation proceedings, through donations, and through the expenditure of federal funds, all of which may place restrictions on the use(s) to which the land may be put. These are merely illustrative of the issues that are involved in a discussion of titles to the public land that the state of Minnesota possesses, public lands that have been managed for the public benefit for well over a century.

Domestic Federal Policies – Indians and Land Alienation

Federal Indian policies was driven by federal land alienation policies and the consequential spread of non-Indian settlers and non-Indian, state and local, governments. The President and the Congress formulated such policies although the chief executive was the principal agent in ensuring that the practices designed to effect policy were carried out.

The Executive Order of 1850 was issued to further both the federal land alienation and Indian policies, to remove the occupancy and use rights that had been temporarily granted to the Chippewa in 1837. In issuing the Order President Taylor was following established practices, to facilitate selling the public domain by removing any

aboriginal claims to the title to such lands and by removing the Indians from areas that were becoming settled. He was merely exercising the power delegated to him by Congress to effect such practices.

The Nature of the 1837 Privilege

When the General Land Office, an executive agency, conveyed federal title to lands in the public domain to individuals, states, and corporations it intended to convey all of the rights associated with such titles. As a first step aboriginal American-Indian title was extinguished through treaties, one aspect of domestic policy, and all occupancy and use rights of the former inhabitants were removed. When titles were transferred the federal government, through the GLO, did not intend to convey ownership rights that were restricted by or subject to usufructuary privileges, or hunting and fishing rights possessed by American-Indian groups. These privileges or rights that had been extinguished. As a consequence the federal government never intended the 1837 privilege to be exercisable or exercised on any land that left the public domain. Thus there are no lands within the 1837 ceded area to which the privileges attach.

The Status of Mille Lacs

Mille Lacs has never been declared navigable by a court although I am of the opinion it would be so characterized. Under such conditions the federal authority to grant rights to the water and in the beds under the water to the Mille Lac Band may be limited and the state may exercise considerable authority over the use of the water surface,

the shore – below ordinary high water mark at least, and the biota in and on the lake. The waters of Mille Lacs were not included in the reservation established in 1855 and ceded in 1863 and 1864. The Band does not possess any rights to these waters or the fish stocks in them based on reservation status.

* * *

Treaty With The Wyandot, Etc., 1805, 7 Stat., 87

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

A treaty between the United States of America, and the sachems, chiefs, and warriors of the Wyandot, Ottawa, Chipawa, Munsee and Delaware, Shawanee, and Pottawatima nations, holden at Fort Industry, on the Miami of the lake, on the fourth day of July, Anno Domini, one thousand eight hundred and five.

ARTICLE I. The said Indian nations do again acknowledge themselves and all their tribes, to be in friendship with, and under the protection of the United States.

ARTICLE II. The boundary line between the United States, and the nations aforesaid, shall in future be a meridian line drawn north and south, through a boundary to be erected on the south shore of lake Erie, one hundred and twenty miles due west of the west boundary line of the state of Pennsylvania, extending north until it intersects the boundary line of the United States, and extending south it intersects a line heretofore established by the treaty of Grenville.

ARTICLE III. The Indian nations aforesaid, for the consideration of friendship to the United States, and the sums of money hereinafter mentioned, to be paid annually the Wyandot, Shawanee, Munsee and Delaware nations, have ceded and do hereby cede and relinquish to said United States for ever, all the lands belonging to said United States, lying east of the aforesaid line, bounded southerly and easterly by the line established by said

treaty of Grenville, and northerly by the northernmost part of the forty first degree of north latitude.

ARTICLE IV. The United States, do preserve harmony, manifest the liberality, and in consideration of the cession made in the preceding article, will, every year forever hereafter, at Detroit, or some other convenient place, pay and deliver to the Wyandot, Munsee, and Delaware nations, and those of the Shawanee and Seneca nations who reside with the Wyandots, the sum of eight hundred and twenty five dollars, current money of the United States, and the further sum on one hundred and seventy five dollars, making in the whole an annuity of one thousand dollars; which last sum of one hundred and seventy five dollars, has been secured to the President, in trust for said nations, by the Connecticut land company, and by the company incorporated by the name of "the proprietors of the half million acres of land lying south of lake Erie, called Sufferer's Land," payable annually as aforesaid, and to be divided between said nations, from time to time, in such proportions as said nations, with the approbation of the President, shall agree.

ARTICLE V. To prevent all misunderstanding hereafter, it is to be expressly remembered, that the Ottawa and Chipawa nations, and such of the Pottawatima nation as reside on the river Huron of lake Erie, and in the neighborhood thereof, have received from the Connecticut land company, and the company incorporated by the name of "the proprietors of the half million acres of land lying south of Lake Erie called Sufferer's Land," the sum of four thousand dollars in hand, and have secured to the President of the United States, in trust from them, the further sum of twelve thousand dollars, payable in six

annual instalments [sic] of two thousand each; which several sums is the full amount of their proportion of the purchases effected by this treaty, and also by a treaty with said companies bearing each date herewith; which proportions were agreed on and concluded by the whose of said nations in their general council; which several sums, together with two thousand nine hundred and sixteen dollars and sixty seven cents, secured to the President, to raise said sum of one hundred and seventy five dollars annuity as aforesaid, is the amount of the consideration paid by the agents of the Connecticut Reserve, for the cession of their lands.

ARTICLE VI. The said Indian nations, parties to this treaty, shall be at liberty to fish and hunt within the territory and lands which they have now ceded to the United States, so long as they shall demean themselves peaceably.

In witness whereof, Charles Jouett, esquire, a commissioner on the part of the United States, and the sachems, chiefs, and warriors, of the Indian nations aforesaid, have hereto set their hands and seals.

Charles Jouett, [L. S.]

Ottawa:

Nekeik, or Little Otter, his x mark, [L. S.]
Kawachewan, or Eddy, his x mark, [L. S.]
Mechimenduch, or Big Bowl, his x mark, [L. S.]
Aubaway, his x mark, [L. S.]
Ogonse, his x mark, [L. S.]
Sawgamaw, his x mark, [L. S.]
Tusquagan, or McCarty, his x mark, [L. S.]
Tondawganie, or the Dog, his x mark, [L. S.]
Ashawet, his x mark, [L. S.]

Chippewa:

Macquettoquet, or Little Bear, his x mark, [L. S.]
Quitchonequit, or Big Cloud, his x mark, [L. S.]
Queoonequetwabaw, his x mark, [L. S.]
Oscaquassanu, or Young Boy, his x mark, [L. S.]
Monimack, or Cat Fish, his x mark, [L. S.]
Tonquish, his x mark, [L. S.]

Pattawatima:

Noname, his x mark, [L. S.]
Mogawh, his x mark, [L. S.]

Wyandot:

Tarhee, or the Crane, his x mark, [L. S.]
Miere, or Walk in Water, his x mark, [L. S.]
Thateyyanayoh, or Leather Lips, his x mark, [L. S.]
Harrowenyou, or Cherokee Boy, his x mark, [L. S.]
Tschauendah, his x mark, [L. S.]
Tahunehawettee, or Adam Brown, his x mark, [L. S.]
Shawrunthie, his x mark, [L. S.]

Munsee and Delaware:

Puckconsittond, his x mark, [L. S.]
Paahmehelot, his x mark, [L. S.]
Pamoxet, or Armstrong, his x mark, [L. S.]
Pappellelond, or Beaver Hat, his x mark, [L. S.]

Shawanee:

Wayapurseawaw, or Blue Jacket, his x mark, [L. S.]
Cutheaweasaw, or Black Hoff, his x mark, [L. S.]
Auonasechia, or Civil Man, his x mark, [L. S.]
Isaac Peters, his x mark, [L. S.]

In presence of –

Wm. Dean, C. F. L. C.
J. B. Mower,
Jasper Parrish,
Whitmore Knaggs,
William Walker,

Interpreters.

Israel Ruland,
E. Brush.

Treaty With The Quapaw, 1818, 7 Stat., 176

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

A treaty of friendship, cession, and limits, made and entered into, this twenty-fourth day of August, eighteen hundred and eighteen, by, and between, William Clark and Auguste Chouteau, Commissioners on the part and behalf of the United States, of the one part, and the undersigned, chiefs and warriors of the Quapaw tribe or nation, on the part and behalf of their said tribe or nation, of the other part.

ART. 1. The undersigned chiefs and warriors, for themselves and their said tribe or nation, do hereby acknowledge themselves to be under the protection of the United States, and of no other state, power or sovereignty, whatsoever.

ART. 2. The undersigned chiefs and warriors, for themselves and their said tribe or nation, do hereby, for, and in consideration of, the promises and stipulations hereinafter named, cede and relinquish to the United States, forever, all the lands within the following boundaries, viz: Beginning at the mouth of the Arkansaw river; thence extending up the Arkansaw, to the Canadian fork, and upon the Canadian fork to its source; thence south, to Big Red river, and down the middle of that river, to the Big Raft; thence, a direct line, so as to strike the Mississippi river, thirty leagues in a straight line, below the mouth of Arkansaw; together with all their claims of land east of the Mississippi, and north of the Arkansaw river, included within the colored lines 1, 2, and 3, on the above map,* with the exception and reservation following, that

is to say: the tract of country bounded as follows: Beginning at a point on the Arkansaw river, opposite the present post of Arkansaw, and running thence, a due southwest course, to the Washita river; thence, up that river, to the Saline fork; and up the Saline fork to a point, from whence a due north course would strike the Arkansaw river at the Little Rock; and thence, down the right bank of the Arkansaw, to the place of beginning: which said tract of land, last above designated and reserved, shall be surveyed and marked off, at the expense of the United States, as soon as the same can be done with convenience, and shall not be sold or disposed of, by the said Quapaw tribe or nation, to any individual whatever, nor to any state or nation, without the approbation of the United States first had and obtained.

ART. 3. It is agreed, between the United States and the said tribe or nation, that the individuals of the said tribe or nation shall be at liberty to hunt within the territory by them ceded to the United States, without hindrance or molestation, so long as they demean themselves peaceably, and offer no injury or annoyance to any of the citizens of the United States, and until the said United States may think proper to assign the same, or any portion thereof, as hunting grounds to other friendly Indians.

ART. 4. No citizen of the United States, or any other person, shall be permitted to settle on any of the lands hereby allotted to, and reserved for, the said Quapaw tribe or nation, to live and hunt on; yet it is expressly understood and agreed on, by, and between, the parties aforesaid, that, at all ties, the citizens of the United States shall have the right to travel and pass freely, without toll

or exaction, through the Quapaw reservation, by such roads or routes as now are, or hereafter may be, established.

ART. 5. In consideration of the cession and stipulations aforesaid, the United States do hereby promise and bind themselves to pay and deliver to the said Quapay tribe or nation, immediately upon the execution of this treaty, goods and merchandise to the value of four thousand dollars, and to deliver, or cause to be delivered, to them, yearly, and every year, goods and merchandise to the value of one thousand dollars, to be estimated in the city or place, in the United States, where the same are procured or purchased.

ART. 6. Least the friendship which now exists between the United States and the said tribe or nation, should be interrupted by the misconduct of individuals, it is hereby agreed, that, for injuries done by individuals, no private revenge or retaliation shall take place; but, instead thereof, complaints shall be made by the party injured, to the other; by the tribe or nation aforesaid, to the governor, superintendent of Indian affairs, or some other person authorized and appointed for that purpose; and by the governor, superintendent, or other person authorized, to the chiefs of the said tribe or nation. And it shall be the duty of the said tribe or nation, upon complaint being made, as aforesaid, to deliver upon the person or persons, against whom the complaint is made, to the end that he or they may be punished, agreeably to the laws of the state or territory where the offense may have been committed; and, in like manner, if any robbery, violence, or murder, shall be committed on any Indian or Indians, belonging to the said tribe or nation, the person

or persons so offending shall be tried, and, if found guilty, punished in like manner as if the injury had been done to a white man. And it is further agreed, that the chiefs on the said tribe or nation shall, to the utmost of their power, exert themselves to recover horses, or other property, which may be stolen from any citizen or citizens of the United States, by any individual or individuals of the said tribe or nation; and the property so recovered, shall be forthwith delivered to the governor, superintendent, or other person authorized to receive the same, that it may be restored to the proper owner. And in case where the exertions of the chief shall be ineffectual in recovering the property stolen, as aforesaid, if sufficient proof can be obtained that such property was actually stolen by an Indian or Indians, belonging to the said tribe or nation, a sum, equal to the value of the property which has been stolen, may be deducted, by the United States, from the annuity of said tribe or nation. And the United States hereby guaranty to the individuals of the said tribe or nation, a full indemnification for any horse or horses, or other property, which may be taken from them by any of their citizens: Provided, the property so stolen cannot be recovered, and that sufficient proof is produced that it was actually stolen by a citizen or citizens of the United States.

ART. 7. This treaty shall take effect, and be obligatory on the contracting parties, as soon as the same shall have been ratified by the President of the United States, by and with the advice and consent of the Senate.

William Clarke, [L. S.]
Aug. Chouteau, [L. S.]

Krakaton, or the Dry Man, his x mark, [L. S.]
Hradapaa, or the Eagle's Bill, his x mark, [L. S.]
Mahraka, or Buck Wheat, his x mark, [L. S.]
Honkadagni, his x mark, [L. S.]
Wagonkedatton, his x mark, [L. S.]
Hradaskamonmini, or the Pipe Bird, his x mark, [L. S.]
Patongdi, or the Approaching Summer, his x mark, [L. S.]
Tehonka, or the Tame Buffaloe, his x mark, [L. S.]
Hamonmini, or the Night Walker, his x mark, [L. S.]
Washingteteton, or Mocking Bird's Bill, his x mark, [L. S.]
Hontikani, his x mark, [L. S.]
Tatonsa, or the Whistling Wind, his x mark, [L. S.]
Mozatete, his x mark, [L. S.]

Done at St. Louis in the presence of –

R. Wash, Secretary to the commission,
R. Paul, Col. M. M. C. I.
Jn. Ruland, Sub. Agent, &c.
R. Graham, Indian Agent,
M. Lewis CLark,
J. T. Honore, Indian Interpreter,
Joseph Bonne, Interpreter,
Julius Pescay,
Stephen Julain, U. S. Indian Interpreter,
James Loper,
William P. Clark

Treaty Of September 21, 1832, 7 Stat., 374

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Articles of a Treaty of Peace, Friendship and Cession, concluded at Fort Armstrong, Rock Island, Illinois, between the United States of America, by their Commissioners, Major General Winfield Scott, of the United States Army, and his Excellency John Reynolds, Governor of the State of Illinois, and the confederated tribes of Sac and Fox Indians, represented, in general Counsel, by the undersigned Chiefs, Headmen and Warriors.

WHEREAS, under certain lawless and desperate leaders, a formidable band, constituting a large portion of the Sac and Fox nation, left their country in April last, and, in violation of treaties, commenced an unprovoked war upon unsuspecting and defenceless citizens of the United States, sparing neither age nor sex; and whereas, the United States, at a great expense of treasure, have subdued the said hostile band, killing or capturing all its principal Chiefs and Warriors – the said States, partly as indemnity for the expense incurred, and partly to secure the future safety and tranquility of the invaded frontier, demand of the said tribes, to the use of the United States, a cession of a tract of the Sac and Fox country, bordering on said frontier, more than proportional to the numbers of the hostile band who have been so conquered and subdued.

ARTICLE I. Accordingly, the confederated tribes of Sacs and Foxes hereby cede to the United States forever, all the lands to which the said tribes have title, or claim, (with

the exception of the reservation hereinafter made,) included within the following bounds, to wit: Beginning on the Mississippi river, at the point where the Sac and Fox northern boundaryline, as established by the second article of the treaty of Prairie du Chien, of the fifteenth of July, one thousand eight hundred and thirty, strikes said river; thence, up said boundary line to a point fifty miles from the Mississippi, measured on said line; thence, in a right line to the nearest point on the Red Cedar of the Ioway, forty miles from the Mississippi river; thence, in a right line to a point in the northern boundary line of the State of Missouri, fifty miles, measured on said boundary, from the Mississippi river; thence, by the last mentioned boundary to the Mississippi river, and by the western shore of said river to the place of beginning. And the said confederated tribes of Sacs and Foxes hereby stipulate and agree to remove from the lands herein ceded to the United States, on or before the first day of June next; and, in order to prevent any future misunderstanding, it is expressly understood, that no band or party of the Sac or Fox tribes shall reside, plant, fish, or hunt on any portion of the ceded country after the period just mentioned.

ARTICLE II. Out of the cession made in the preceding article, the United States agree to a reservation for the use of the said confederated tribes, of a tract of land containing four hundred square miles, to be laid off under the directions of the President of the United States, from the boundary line crossing the Ioway river, in such manner that nearly an equal portion of the reservation may be on both sides of said river, and extending downwards, so as to include ke-o-kuck's principal village on its right bank,

which village is about twelve miles form the Mississippi river.

ARTICLE III. In consideration of the great extent of the foregoing cession, the United States stipulate and agree to pay to the said confederated tribes, annually, for thirty successive years, the first payment to be made in September of the next year, the sum of twenty thousand dollars in specie.

ARTICLE IV. It is further agreed that the United States shall establish and maintain within the limits, and for the use and benefit of the Sacs and Foxes, for the period of thirty years, one additional black and gun smith shop, with the necessary tools, iron and steel; and finally make a yearly allowance for the same period, to the said tribes, of forty kegs of tobacco, and forty barrels of salt, to be delivered at the mouth of the Ioway river.

ARTICLE V. The United States, at the earnest request of the said confederated tribes, further agree to pay the Farnham and Davenport, Indian traders at Rock Island, the sum of forty thousand dollars without interest, which sum will be in full satisfaction of the claims of the said traders against the said tribes, and by the latter was, on the tenth day of July, one thousand eight hundred and thirty-one, acknowledged to be justly due, for articles of necessity, furnished in the course of the seven preceding years, in an instrument of writing of said date, duly signed by the Chiefs and Headmen of said tribes, and certified by the late Felix St. Vrain, United States' agent, and Antoine Le Claire, United States' Interpreter, both for the said tribes.

ARTICLE VI. At the special request of the said confederated tribes, the United States agree to grant, by patent, in fee simple, to Antoine Le Claire, Interpreter, a part Indian, one section of land opposite Rock Island, and one section at the head of the first rapids above said Island, within the country herein ceded by the Sacs and Foxes.

ARTICLE VII. Trusting to the good faith of the neutral bands of Sacs and Foxes, the United States have already delivered up to those bands the great mass of prisoners made in the course of the war by the United States, and promise to use their influence to procure the delivery of other Sacs and Foxes, who may still be prisoners in the hands of a band of Sioux Indians, the friends of the United States; but the following named prisoners of war, now in confinement, who were Chiefs and Headmen, shall be held as hostages for the future good conduct of the late hostile bands, during the pleasure of the President of the United States, vis: – Muk-ka-ta-mish-a-ka-kaik (or Black Hawk) and his two sons; Wau-ba-kee-shik (the Prophet) his brother and two sons; Na-pope; We-sheet Ioway; Pamaho; and Cha-kee-pa-shi-pa-ho (the little stabbing Chief).

ARTICLE VIII. And it is further stipulated and agreed between the parties to this treaty, that there shall never be allowed in the confederated Sac and Fox nation, any separate band, or village, under any chief or warrior of the late hostile bands; but that the remnant of the said hostile bands shall be divided among the neutral bands of the said tribes according to blood – the Sacs among the Sacs, and the Foxes among the Foxes.

ARTICLE IX. In consideration of the premises, peace and friendship are declared, and shall be perpetually maintained between the United States and the whole confederated Sac and Fox nation, excepting from the latter the hostages before mentioned.

ARTICLE X. The United Stats, besides the presents, delivered at the signing of this treaty, wishing to give a striking evidence of their mercy and liberality, will immediately cause to be issued to the said confederated tribes, principally for the use of the Sac and Fox women and children, whose husbands, fathers and brothers, have been killed in the late war, and generally for the use of the whole confederated tribes, articles of subsistence as follows: – thirty-five beef cattle; twelve bushels of salt; thirty barrels of pork; and fifty barrels of flour, and cause to be delivered for the same purposes, in the month of April next, at the mouth of the lower Ioway, six thousand bushels of maize or Indian corn.

ARTICLE XI. At the request of the said confederated tribes, it is agreed that a suitable present shall be made to them on their pointing out to any United States agent, authorized for the purpose, the position or positions of one or more mines, supposed by the said tribes to be of a metal more valuable than lead or iron.

ARTICLE XII. This treaty shall take effect and be obligatory on the contracting parties, as soon as the same shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof.

Done at Fort Armstrong, Rock Island, Illinois, this twenty-first day of September, in the year of our Lord one

thousand eight hundred and thirty-two, and of the independence of the United States the fifty-seventh.

Winfield Scott, John Reynolds.

Sacs.

Kee-o-kuck, or he who has been every where, his x mark,
Pa-she-pa-ho, or the stabber, his x mark,
Pia-tshe-noay, or the noise maker, his x mark,
Wawk-kum-mee, or clear water, his x mark,
O-sow-wish-kan-no, or yellow bird, his x mark,
Pa-ca-tokee, or wounded lip, his x mark,
Winne-wun-quai-saat, or the terror of man, his x mark,
Mau-noa-tuck, or he who controls many, his x mark,
Wau-we-au-tun, or the curling wave, his x mark,

Foxes.

Wau-pel-la, or he who is painted white, his x mark,
Tay-wee-mau, or medicine man, (strawberry,) his x mark,
Pow-sheek, or the roused bear, his x mark,
An-nau-mee, or the running fox, his x mark,
Ma-tow-e-qua, or the jealous woman, his x mark,
Me-shee-wau-quaw, or the dried tree, his x mark,
May-kee-sa-mau-ker, or the wampum fish, his x mark,
Chaw-co-saut, or the prowler, his x mark,
Kaw-kaw-kee, or the crow, his x mark,
Mau-que-tee, or the bald eagle, his x mark,
Ma-she-na, or cross man, his x mark,
Kaw-kaw-ke-monte, or the pouch, (running bear,) his x mark,
Wee-she-kaw-k-a-skuck, or he who steps firmly, his x mark,
Wee-ca-ma, or good fish, his x mark,
Paw-qua-nuey, or the runner, his x mark,
Ma-hua-wai-be, or the wolf skin, his x mark,
Mis-see-quaw-kaw, or hairy neck, his x mark,
Waw-pee-shaw-kaw, or white skin, his x mark,
Mash-shen-waw-pee-tch, or broken tooth, his x mark,
Nau-nah-que-kee-shee-ko, or between two days, his x mark,

Paw-puck-ka-kaw, or stealing fox, his x mark,
Tay-e-sheek, or the falling bear, his x mark,
Wau-pee-maw-ker, or the white loon, his x mark,
Wau-co-see-nee-me, or fox man, his x mark,

In presence of –

R. Bache, captain ordnance, secretary to the commission,
Abrm. Eustis,
Alex. Cummings, lieutenant-colonel Second Infantry,
Alex. R. Thompson, major U. S. Army,
Sexton G. Frazer,
P. H. Galt, Assistant Adjutant-General,
Benj. F. Pike,
Wm. Henry,
James Craig,
John Aukeney,
J. B. F. Russell,
Isaac Chambers,
John Clitz, adjutant infantry,
John Pickell, lieutenant Fourth Artillery,
A. G. Miller, lieutenant First Infantry,
Geo. Davenport, assistant quartermaster-general Illinois Militia,
A. Drane,
Æneas Mackay, captain U. S. Army,
J. R. Smith, first lieutenant Second Infantry,
Wm. Maynaidier, lieutenant and aid-de-camp,
J. S. Gallagher, first lieutenant, acting commissary subsistence,
N. B. Bennett, lieutenant Third Artillery.
B. Riley, major U. S. Army,
H. Dodge, major,
W. Campbell,
Hy. Wilson, major Fourth U. S. Infantry,
Donald Ward,
Thos. Black Wolf,
Horatio A. Wilson, Lieutenant Fourth Artillery,

H. Dav, lieutenant Second Infantry,
Jas. W. Penrose, lieutenant Second Infantry,
J. E. Johnston, lieutenant Fourth Artillery,
S. Burbank, lieutenant First Infantry,
J. H. Prentiss, lieutenant First Artillery,
L. J. Beall, lieutenant First Infantry,
Addison Philleo,
Thomas L. Alexander, lieutenant Sixth Infantry,
Horace Beale, acting surgeon U. S. Army,
Oliver W. Kellogg,
Jona Leighton, acting surgeon U. S. Army,
Robt. C. Buchanan, lieutenant Fourth Infantry,
Jas. S. Williams, lieutenant Sixth Infantry,
John W. Spencer,
Antoine Le Claire, interpreter.

Treaty Of May 13, 1833, 7 Stat., 424

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Articles of agreement or a treaty between the United States and the Quapaw Indians entered into by John F. Schermerhorn, commissioner of Indian affairs west on the part of the United States and the chiefs and warriors of the Quapaw Indians.

WHEREAS, by the treaty between the United States and the Quapaw Indians, concluded November 15, 1824, they ceded to the United States all their lands in the Territory of Arkansas, and according to which they were *"to be concentrated and confined to a district of country inhabited by the Caddo Indians and form a part of said tribe,"* and whereas they did remove according to the stipulations of said treaty, and settled on the Bayou Treache on the south side of Red River, on a tract of land given them by the Caddo Indians, but which was found subject to frequent inundations on account of the raft on Red River, and where their crops were destroyed by the water year after year, and which also proved to be a very sickly country and where in a short time, nearly one-fourth of their people died, and whereas they could obtain no other situation from the Caddoes and they refused to incorporate them and receive them as a constituent part of their tribe as contemplated by their treaty with the United States, and as they saw no alternative but to perish if they continued there, or to return to their old residence on the Arkansas, they therefore chose the latter; and whereas they now find themselves very unhappily situated in consequence of having their little improvements taken from them by

the settlers of the country; and being anxious to secure a permanent and peaceable home the following articles or treaty are agreed upon between the United States and the Quapaw Indians by John F. Schermerhorn ___ ___ ___ commissioners of Indian affairs west and the chiefs and warriors of said Quapaw Indians this (13th) thirteenth day of May 1833. –

Article I. The Quapaw Indians hereby relinquish and convey to the United States all their right and title to the lands given them by the Caddo Indians on the Bayou Treache of Red River. –

Art. II. The United States hereby agree to convey to the Quapaw Indians one hundred and fifty sections of land west of the State line of Missouri and between the lands of the Senecas and Shawnees, not heretofore assigned to any other tribe of Indians, the same to be selected and assigned by the commissioners of Indian affairs west, and which is expressly designed to be [in] lieu of their location on Red River and to carry into effect the treaty of 1824, in order to provide a permanent home for their nation; the United States agree to convey the same by patent, to them and their descendants as long as they shall exist as a nation or continue to reside thereon, and they also agree to protect them in their new residence, against all interruption or disturbance from any other tribe or nation of Indians or from any other person or persons whatever.

Art. III. Whereas it is the policy of the United States in all their intercourse with the Indians to treat them liberally as well as justly, and to endeavor to promote their civilization and prosperity; it is further agreed that

in consideration of the important and extensive cessions of lands made by the Quapaws to the United States and in view of their present impoverished and wretched condition, they shall be removed to their new homes at the expense of the United States and that they will supply them with one year's provision from the time of their removal, which shall be as soon as they receive notice of the ratification of this treaty by the President and Senate of the United States. The United States will also furnish and deliver to them, after their arrival at their new homes, one hundred cows, one hundred breeding hogs, one hundred sheep, ten yoke of working cattle, twenty-five ploughs, one hundred axes, one hundred hoes, four ox carts, and one wagon, with all their necessary rigging, twenty iron hand cornmills, tools of different descriptions to the amount of two hundred dollars, also looms, wheels, reels and wool-cards to the amount of two hundred dollars, one hundred blankets, fifty rifles, and five shot guns all with flint locks, ten kegs of powder, and six hundred pounds of lead; The United States agree to provide a farmer to reside with them and to aid and instruct them in their agricultural pursuits and a blacksmith to do their necessary work, with a shop and tools and iron and steel not exceeding one ton per year. The United States also agree to appropriate one thousand dollars per year for education purposes to be expended under the direction of the President of the United States; the farmer and blacksmith and the above appropriation for education purposes to be continued only as long as the President of the United States deems necessary for the best interest of the Indians.

ART. IV. It is hereby mutually agreed upon between the parties respectively to this treaty, that in lieu of and in full consideration of their present annuities perpetual and limited, the United States will pay the debts of the Quapaw Indian according to the annexed schedule to the amount of four thousand one hundred and eighty dollars provided they can be discharged in full for that amount. They will also expend to the amount of one thousand dollars in hiring suitable labourers to build and aid them in erecting comfortable cabins and houses to live in; and also that they will supply them annually two thousand dollars for twenty years from the ratification of this treaty, and that out of said annuity there shall be allowed to their four principal chiefs, Hackaton, Sarassan, Tonnonjinka and Kahaketteda, and to their successors each, in addition to the distributive share of said annuity, the sum of fifty dollars per year.

ART. V. It is hereby agreed, and expressly understood, that this treaty is only supplementary to the treaty of 1824, and designed to carry into effect the views of the United States in providing a permanent and comfortable home for the Quapaw Indians; and also that all the stock and articles furnished the Indians by the United States as expressed in the fourth article shall be under the care and direction of the agent and farmer of said tribe, to see that the same is not squandered or sold, or any of the stock slain by the Indians, until such time as the natural increase of the stock will warrant the same to be done without destroying the whole, and thus defeating the benevolent views of the Government in making this provision for them.

ART. VI. The United States also agrees to employ an interpreter to accompany them on their removal and the same to continue with them during the pleasure of the President of the United States – The above treaty shall be binding on the United States whenever ratified and approved by the President and Senate of the United States. –

John F. Schermerhorn, Hackatton chief, his x mark,
Sarrisin chief, his x mark,
Taunoujinka chief, his x mark,
Kaheketteda chief, his x mark,
Menehunka, his x mark,
Kunkadaquene, his x mark
Wattekiane, his x mark,
Hadaskamonene, his x mark,
Hummonene, his x mark,
Hikaguedotton, his x mark,
Moussochane, his x mark.

The above treaty was signed in open council, in the presence of –

Richard M. Hannum, S. A.
Antoine Barraque,
James W. Walker,
Frederick Saugrain,
John D. Shaw,
Joseph Duchasin, interpreter.

The amount due from the Quapaw tribe of Indians to the following named persons –

Frederick Notrabe	$567 00
Joseph Dardene	300 00
Ignace Bogy	170 00
Alexander Dickerson	28 00
William Montgomery	350 00
Joseph Bonne	30 00
Joseph Duchasin	30 00
Baptiste Bonne	20 00
Antoine Barraque	2,235 00
George W. Boyer	50 00
Weylon King	400 00
	$4,180 00

Treaty Of October 9, 1833, 7 Stat., 448

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Articles of agreement and convention, made this ninth day of October, A. D. 1833, at the Grand Pawnee village, on the Platte river between Henry L. Ellsworth, commissioner in behalf of the United States, and the chiefs and head-men of the four confederated bands of Pawnees, viz. – Grand Pawnees, Pawnee Loups, Pawnee Republicans, and Pawnee Tappaye, residing on the Patte and the Loup fork.

ART. I. The confederated bands of Pawnees aforesaid hereby cede and relinquish to the United States all their right, interest, and title in and to all the land lying south of the Platte river.

ART. II. The land ceded and relinquished hereby, so far as the same is not and shall not be assigned to any tribe or tribes, shall remain a common hunting ground, during the pleasure of the President, for the Pawnees and other friendly Indians, who shall be permitted by the President to hunt on the same.

ART. III. The United States, in consideration of said cession and for the purpose of advancing the welfare of the said Pawnees, agree to pay said bands annually, for their term of twelve years, the sum of forty-six hundred dollars in goods, at not exceeding St. Louis prices, as follows: to the Grand Pawnees and Republican villages, each thirteen hundred dollars, and to the Pawnee Loups and Tappaye Pawnee villages each one thousand dollars, and said annuity to said Grand Pawnees is in full remuneration for removal from the south to the north side of the Platte, and building again.

ART. IV. The United States agree to pay to each of said four bands, for five years, the sum of five hundred dollars in agricultural implements; and to be continued longer if the President thinks proper.

ART. V. The United States agree to allow one thousand dollars a year for ten years, for schools to be established for the benefit of said four bands at the discretion of the President.

ART. VI. The United States agree to furnish two blacksmiths and two strikers, with shop, tools and iron, for ten years, for said four bands, at an expense not exceeding two thousand dollars in the whole annually.

ART. VII. The United States agree to furnish each of said four tribes with a farmer for five years, and deliver to said farmers for the benefit of said nation, one thousand dollars value in oxen and other stock. But said stock is not to be delivered into the hands of the said Pawnees, until the President thinks the same can be done with propriety and safety.

ART. VIII. The United States agree to erect, for each of said four bands, a horse-mill for grinding corn.

ART. IX. The Pawnee nation renew their assurance of friendship for the white men, their fidelity to the United States, and their desire for peace with all neighboring tribes of red men. The Pawnee nation therefore agree not to molest or injure the person or property of any white citizen of the United States, wherever found, nor to make war upon any tribe with whom said Pawnee nation now are, or may be, at peace; but should any difficulty arise between said nation and any other tribe, they agree to

refer the matter in dispute to such arbiter as the President shall appoint to settle the same.

ART. X. It is agreed and understood that the United States shall not be bound to fulfil the stipulations contained in the fifth, seventh, and eighth articles, until said tribes shall locate themselves in convenient agricultural districts, and remain in these districts the whole year, so as to give protection to the teachers, the farmers, stock and mill.

ART. XI. The United States, desirous to show the Pawnees the advantages of agriculture, engage in case the Pawnees cannot agree to remain to protect their domestic interest, to break up for each village a piece of land suitable for corn and potatoes for one season; and should either village at any time agree to give the protection required, said village shall be entitled to the benefits conferred in said fifth, seventh, and eighth articles.

ART. XII. In case the Pawnee nation will remain at home during the year, and give the protection specified, the United States agree to place twenty-five guns, with suitable ammunition, in the hands of the farmers of each village, to be used in case of an attack from hostile bands.

ART. XIII. The United States further agree to deliver to said four bands collectively, on the execution of this treaty, the amount of sixteen hundred dollars in goods and merchandise, and the receipt of the same is hereby acknowledged by said bands.

ART. XIV. These articles of agreement and convention shall be obligatory and binding when ratified by the President and Senate of the United States.

In testimony whereof the said Henry L. Ellsworth, commissioner, and the chiefs and head men of the four confederated bands of the Grand Pawnees, Pawnee Loups, Pawnee Republicans, and Tappaye Pawnees, have hereunto signed their names and affixed their seals on the day and year above written.

Henry L. Ellsworth.
Grand Pawnees:
Shah-re-tah-riche, his x mark, [L. S.]
Shon-gah-kah-he-gah, his x mark, [L. S.]
Pe-tah-lay-shah-rho, his x mark, [L. S.]
Ah-sha-kah-tah-kho, his x mark, [L. S.]
Pawnee Republicans:
Blue Coat, his x mark, [L. S.]
Lay-shah-rho-lah-re-ho-rho, his x mark, [L. S.]
Ah-shah-lay-kah-sah-hah, his x mark, [L. S.]
Lay-shah-ke-re-pahs-kay, his x mark, [L. S.]
Tappaye Pawnees:
Little Chief, his x mark, [L. S.]
Lah-ho-pah-go-lah-lay-shah-rho, his x mark, [L. S.]
Ah-ke-tah-we-he-kah-he-gay, his x mark, [L. S.]
Skah-lah-lay-shah-rho, his x mark, [L. S.]
Pawnee Loups:
Bix Axe, his x mark, [L. S.]
Middle Chief, his x mark, [L. S.]
Spotted Horse, his x mark, [L. S.]
Big soldier, his x mark, [L. S.]

Signed, sealed, and delivered in the presence of –

Edward A. Ellsworth, secretary pro tempore,
Jno. Dougherty, Indian agent,
A. L. Papin,
Ware S. May, M. D.
John Dunlop,
John T. Irving, jr.
Lewis La Chapelle, interpreter.

1856 COIA Report, *Selected Pages

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

OFFICIAL OPINIONS

OF

THE ATTORNEYS GENERAL
OF THE UNITED STATES,

ADVISING THE

PRESIDENT AND HEADS OF DEPARTMENTS,
IN RELATION TO THEIR OFFICIAL DUTIES,

AND EXPOUNDING THE CONSTITUTION, TREATIES WITH FOREIGN GOVERNMENTS AND WITH INDIAN TRIBES, AND THE PUBLIC LAWS OF THE COUNTRY.

COMPILED, WITH NOTES AND REFERENCES.
BY BENJAMIN F. HALL,
COUNSELOR AT LAW, NEW YORK.

VOLUME V

COMPLETED TO GO HARON, 1863, WITH AN APPENDIX,
BY C. C. ANDREWS,
COUNSELOR AT LAW.

WASHINGTON:
PUBLISHED BY ROBERT FARNHAM.
1856.

* * *

PAYMENT OF AWARDS OF THE CHEROKEE COMMISSIONERS.

Payment of the awards of the commissioners appointed to adjudicate certain claims preferred against the United States, under the treaty of 1835-'36 with the Cherokees, since the passage of the act of July 29, 1846, is required to be made to the claimant, or claimants, or to his, her, or their executor or executors, administrator or administrators, unless some other person shall produce a warrant of attorney, attested, witnessed, and acknowledged, referring to the resolution allowing the claim and specifying the amount, and authorizing him to receive it.

Neither the agent, nor attorney who prosecuted any claim, nor any substituted attorney, is entitled to receive the amount except he produce such a warrant from the claimant.

ATTORNEY GENERAL'S OFFICE,
September 20, 1848.

SIR: In the papers referred to my predecessor, in the case of Betsey McIntosh, it appears that she was a claimant under the Cherokee treaty of 1835-'36, and that her claims were allowed by the board of commissioners to the amount of seven thousand six hundred and eighty dollars, and a certificate issued by them in her favor for that sum. In order to procure the allowance of her claims before said board or elsewhere, she had, on the 9th of January, 1845, executed a power of attorney to H. McD. McElrath, authorizing him to prosecute and settle them with power of substitution; and stipulating that he should receive and be paid, for his services and expenses, one-half of what might ultimately be recovered.

On the 15th of May, 1847, McElrath appointed John H. Eaton, esq., his attorney, for him and in his name to receive, receipt for, and give acquittance, with or without seal, for all and every such sums of money as might be due or awarded to him (McElrath) as attorney in fact of Betsey McIntosh. On the 14th of March, 1848, Congress passed an act entitled "A resolution for the relief of Betsey McIntosh," and thereby enacted that, agreeably to the joint resolution of the 15th of June, 1844, the Secretary of the Treasury pay, or cause to be paid, the amount of said certificate to the said Betsey McIntosh, out of any unexpended appropriation therefor made, under an act approved the 2d of July, 1836, entitled "An act making further appropriations for carrying into effect certain Indian treaties." The question is whether payment can be made under the aforesaid powers of attorney.

Before the passage of the resolution of March 14, 1848, the unexpended balance of the appropriation made under the act of July 2, 1836, was not applicable to the payment of this claim. This had been settled, upon an opinion of the Attorney General. The joint resolution of the 15th June, 1844, directed the Secretary of the Treasury to pay, or cause to be paid, the several sums found due to claimants under the Cherokee treaty of 1836, upon the certificates issued by the board of commissioners appointed in pursuance of the 17th article of said treaty, out of the unexpended balance of appropriations made for the payment of such claims, upon the presentation of said certificates; but there was no such unexpended balance. Of course, it became necessary to apply to Congress, as was done at the recent session.

This payment, therefore, if it be made at all, must be made under the resolution of March 14, 1848, which alone appropriates the money to this object, and authorizes it to be drawn from the treasury. But the act of July 29, 1846, provides, "that whenever a claim on the United States aforesaid shall hereafter have been allowed by a resolution or act of Congress, and thereby directed to be paid, the money shall not, nor shall any part thereof, be paid to any person or persons other than the claimant or claimants, his or their executor or executors, administrator or administrators, unless such person or persons shall produce to the proper disbursing officer a warrant of attorney, executed by such claimant or claimants, executor or executors, administrator or administrators, after the enactment of the resolution or act allowing the claim and every such warrant of attorney shall refer to such resolution or act, and expressly recite the amount allowed thereby, and shall be attested by two competent witnesses and be acknowledged," &c. This act has not been complied with; and, if it applies to the present case, no payment can be made under these powers of attorney, which do not conform to it. But here a claim on the United States to the amount of $7,680 has been allowed after the passage of that act by a resolution of Congress, and thereby directed to be paid, which are the only conditions mentioned in the act upon which its application is made to depend. And no reason is perceived why the case does not fall within the intent as well as within the words of the act.

No claim can be made by Mr. McElrath to draw this money, or any part of it, from the treasury, as the assignee of Betsey McIntosh. Supposing the agreement to be fair

and legitimate, that he shall have one-half of the claim for prosecuting and collecting it; yet the power of attorney does not, in form, contain any assignment. And if it did, the resolution which authorizes the payment does not recognise him as an assignee, nor direct any part to be paid to him; but, on the other hand, it directs the whole to be paid to Betsey McIntosh. He therefore could receive no part of the money, except as her attorney, and as such he must comply with the act of 1846. His attorney, who has received a power merely as his attorney, of course stands upon the same ground. And if he had been regularly substituted as her attorney, under the power of substitution, it would make no difference in the result, for the act of 1840 would equally apply to him as to McElrath.

The result will not be different under the regulations of the Indian department. After the passage of the act of 1846, the Secretary of War made the order of the 1st of October of that year, "that, should any Indian or Indians * * * persist in giving powers of attorney, no part of the sum which may be recovered thereupon will be paid to the persons holding them, except such an amount as, under the circumstances of the case, may appear to the department to be a fair and just compensation for their trouble and expense. The remainder will in all cases be remitted to the agent, or subject for payment to the Indian claimant in person." Under this regulation the Secretary of War has allowed to the attorney fifteen hundred and thirty-six dollars, or one-fifth part of the whole amount, for his services and expenses in prosecuting the claim, and that sum has been paid to him. He now demands the balance of one-half. The acting Secretary of the Treasury refers the question, whether the rule of the

Secretary of War deprives the Treasury Department of any legal authority to make this payment?

This rule of the Secretary of War is to be presumed to have received the assent of the President, and to be his regulation. The act of July 9, 1832, provides "that the President shall appoint, by and with the consent of the Senate, a Commissioner of Indian Affairs, who shall, under the direction of the Secretary of War, and agreeably to such regulations as the President may from time to time prescribe, have the direction and management of all Indian affairs, and of all matters arising out of Indian relations." The act of June 30, 1834, provides, "that the President of the United States shall be, and he is hereby, authorized to prescribe such rules and regulations as he may think fit for carrying into effect the Indian affairs, and for the settlement of the accounts of the various provisions of this act, and of any other act relating to Indian department." The President makes these regulations through the War Department. The question therefore is, whether a regulation so made is obligatory upon the officers of the treasury? The question is a somewhat delicate one; but as it is presented to me, it is incumbent on me to consider it.

The regulation is undoubtedly obligatory on all the departments, if it falls within the power conferred by law upon the President. The power to make regulations is clearly confined to the subject-matter of the regulation within the power. If the payment of money due from the government of the United States to the Indians, by force of treaties, is not an appropriate subject of regulation, it is difficult to conceive why it is not. It is part and parcel of our "Indian Affairs." It is one of the "matters arising out

of Indian relations." And the act making provision for the execution of an Indian treaty, and for the payment of the money due by it, is "an act relating to Indian affairs," the provisions of which are to be carried into effect. The government deals directly not only with the tribe, but with the individuals of the tribe. It exercises a parental or guardian authority over them as a dependent people, in a state of pupilage. Hence the Indian department, with Indian agents and sub-agents, and the care which government extends to their affairs. There seems no good reason to doubt that the payment of moneys due to them from the government, by treaty stipulations, would most peculiarly and properly fall within the reason and object of the power of regulation conferred upon the President, and the general tenor of the recited language by which it is conferred. If it needed any confirmation, we might refer to the act of Congress of March 3d, 1847, by which it is provided "that all executory contracts made and entered into by any Indian for the payment of money or goods, shall be deemed and held to be null and void, and of no binding effect whatever."

The question arises whether the aforesaid regulation of the War Department, or this act of Congress, can have a retrospective effect, or invalidate a previous contract. The regulation is prospective in its language; the act in its obvious meaning. No law is to be presumed to have a retrospective intent unless required by its terms. This is the well settled rule. If, therefore, there was a fair and reasonable contract of assignment, which a court of equity would protect and enforce, made prior to both the act and the regulation, it is clear that neither of them would have the effect of invalidating it; and a further

question would then arise, whether it is invalidating a contract of assignment for the government, a third party, to decline its recognition, and to leave the person claiming under it to establish it elsewhere.

But the act of Congress, already referred to, of July 29, 1946, relieves the department of the question, if it be one, by expressly prohibiting the payment except upon a new power of attorney, made in conformity with that act, which is undoubtedly obligatory upon the disbursing officers of the treasury.

An affidavit has been filed for the purpose of showing that Betsey McIntosh was a white woman. However that may be, it is not perceived that it could make any difference in the result.

I have the honor to be, very respectfully, sir, your obedient servant,

ISAAC TOUCEY.

To McClintock Young, Esq.,
Acting Secretary of the Treasury.